IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-493

CITY OF ATLANTIC CITY, in the County of Atlantic, a Municipal Corporation of the State of New Jersey,
Plaintiff-Respondent,

v.

BLOCK C-11, LOT 11

and

ROSE SCHOENTHAL,

Appellants.

Appeal From New Jersey Supreme Court.

JURISDICTIONAL STATEMENT.

STEPHEN HANKIN,
One South New York Avenue,
Atlantic City, New Jersey. 08401
Attorney for Appellants.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

INDEX OF AUTHORITIES.

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, Appellants, Block C-11, Lot 11 and Rose Schoenthal, file this statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the Final Judgment entered by the Supreme Court of New Jersey in this case, in addition to the Judgment of the Supreme Court of New Jersey dismissing Appellants' Motion For Reconsideration and/or Rehearing and that the Supreme Court of the United States should exercise such jurisdiction herein.

OPINIONS BELOW.

The Supreme Court of New Jersey, in a majority opinion by four (4) Justices, has issued a decision in this case, a copy of which appears in Appendix A to this Jurisdictional Statement.

The concurring opinion of three (3) Justices appears in Appendix B to this statement. The Supreme Court of New Jersey thereafter issued an Order denying the Appellants' Motion For Reconsideration, which Order is contained in Appendix C. In a companion case, decided the same day by the same divided composite of Justices, the Supreme Court of New Jersey, in the matter of *Township of Montville v. Block 69, Lot 10, Block 56, Lot 16, Block 98, Lot 12 and Block 39, Lots 1, 75B, 75C, 90, 91, & 92, Assessed to Montville Industrial Park, Inc.*, – N. J. – (Decided June 9, 1977), issued a majority opinion and, as well, a dissenting opinion, both of which are respectively contained in Appendix D and Appendix E. The unreported opinions of the Appellate Division and the Chancery Division of the Superior Court of New Jersey, in the instant matter, are respectively contained in Appendix F and Appendix G.

GROUNDS OF JURISDICTION OF SUPREME COURT.

This appeal arises as a result of the denial of a Motion filed to set aside a Judgment by Default entered against the Appellants by the City of Atlantic City in an In Rem Tax Foreclosure proceeding. The Final Judgment of the New Jersey Supreme Court was entered on June 9, 1977. A Motion For Reconsideration and/or Rehearing was dismissed by the Supreme Court of New Jersey on July 12, 1977. A timely Notice of Appeal was filed on September 7, 1977, in the New Jersey Supreme Court as contained in Appendix H. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Sec. 1257(2).

Cases that sustain the jurisdiction of this Court include *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963); *Myles Salt Co. v. Iberia & St. M. Drainage Dist.*, 239 U. S. 478, 36 S. Ct. 204, 60 L. Ed. 392 (1922); *Fiske v. Kansas*, 274 U. S. 380, 47 S. Ct. 655, 71 L. Ed. 1108 (1927) and *Rohr Aircraft Corp. v. County of San Diego*, 362 U. S. 628, 80 S. Ct. 1050, 4 L. Ed. 2d 1002 (1960).

The following New Jersey Statutes and Rules of Court governing In Rem Tax Foreclosure proceedings are involved in this matter:

New Jersey Statutes Annotated 54:5-104.41 states:

"The plaintiff shall file a copy of the Complaint in the Offices of the Municipal Tax Collector, County Recording Officer and the Attorney-General of the State of New Jersey."

New Jersey Statutes Annotated 54:5-104.42 states:

"The copy of the Complaint filed in the office of the county recording officer and the publication and posting of the Notice as provided by the Rules of the Supreme Court, shall be notice to the world, including all persons claiming any right, title including interest in or lien upon the lands sought to be affected by said Complaint, whether or not the names of said persons appear in said Complaint, of the institution of said foreclosure proceedings In Rem, and that unless said lands be redeemed in the cause as hereinafter provided, the right, title, interest or lien of any such persons and the claim of any or all other persons, whether such right, title interest, lien or claim have or shall have become vested or shall have arisen or may arise prior to or subsequent to the filing of said Complaint, shall be foreclosed and forever debarred and that an indefeasible estate in fee simple in said lands shall be vested in the plaintiff, by the judgment of the said court, as provided in this Act."

New Jersey Statutes Annotated 54:5-104.48 contains the Notice requirements for a New Jersey municipality to owners of realty in an In Rem Tax Foreclosure proceeding and states in relevant part:

"A Notice of Foreclosure *may* be mailed to such persons and all others, *as provided by Rules of the Supreme Court*, but *neither the failure to mail any such notice, nor the failure of any person to receive such notice, shall affect the validity of any action brought pursuant to this Act.*" (Emphasis added)

New Jersey Rule of Court 4:64-7(b) states:

"The plaintiff shall publish once a Notice of Foreclosure in a newspaper generally circulated in the municipality where the lands affected are standing stating (1) that it has commenced an action in the Superior Court by filing a Complaint on a specified

date to foreclose and forever bar any and all rights of redemption of the parcels described in the Tax Foreclosure List contained in the Notice and that the action is brought against the land only and no personal judgment may be entered therein; (2) that any person desiring to protect a right, title or interest in any said parcel by redemption or to contest plaintiff's right to foreclose, must do so by paying the amount required to redeem (which shall be set forth in the Notice) plus interest to date of redemption and such costs as the court may allow, prior to the entry of Judgment therein; or by filing and serving an answer to the Complaint setting forth defendant's answer within 45 days after the date of publication of the Notice; and (3) that in the event of a failure of redemption or answer by a person having the right to redeem or answer, such person shall be forever barred and foreclosed of all his right, title and interest and equality of redemption in and to the parcels of land described in the Tax Foreclosure List. The Notice shall contain a copy of the Tax Foreclosure List."

New Jersey Rule of Court 4:64-7(c) states:

"The plaintiff *may*, within 15 days after the date of publication of the Notice of Foreclosure, mail or cause to be mailed by *ordinary mail*, a copy thereof to the Attorney General and to each person whose name appears as an owner in the Tax Foreclosure List at his last known address as it appears on the last Municipal Tax Duplicates; and to such other persons who, pursuant to N. J. S. A. 54:5-104.48 as amended, have filed a notice with the Tax Collector specifying a title, lien, claim or interest in any of the lands sought to be affected by said Complaint." (Emphasis added)

New Jersey Rule of Court 4:64-7(d) states:

"The plaintiff shall, within 15 days after the date of publication of the Notice, cause a copy thereof to be posted in the Office of the Tax Collector of the plaintiff municipality and in the Office of the County Recording Officer in the county in which the land to be affected by the action is, and in 3 other conspicuous places within the taxing district in which the land is located."

QUESTION PRESENTED.

In *Township of Montville, a Municipal Corporation in the County of Morris, State of New Jersey v. Block 69, Lot 10, Block 56, Lot 16, Block 98, Lot 12 and Block 39, Lots 1, 75B, 75C, 90, 91 & 92, Assessed to Montville Industrial Park.*, — N. J. — (Decided June 9, 1977) (hereinafter referred to as "Township of Montville") which appears in Appendix D to this Jurisdictional Statement, the Supreme Court of New Jersey decided that under both State and Federal constitutional guarantees, in a municipal foreclosure action, where an owner's name and address appear on the municipality's tax rolls, notice of the institution of the foreclosure action *must* be sent by mail to the taxpayer before his right to redeem may be foreclosed. Accordingly, the New Jersey Court held that the notice provisions of the In Rem Tax Foreclosure Act of New Jersey, known as N. J. S. A. 54:5-104.29, *et seq.* (and more specifically, the provisions of N. J. S. A. 54:5-104.48) are unconstitutional both under the New Jersey and the United States Constitutions and, additionally, having noted that because its own Rule of Court 4:64-7 failed to make notice by mail mandatory in foreclosure proceedings, submitted that Rule of Court to its Committee on Civil Practice for revision in accordance with its opinion.

In the instant case, also decided by a divided Bench on June 9, 1977, and as a companion matter and in which a Motion For Reconsideration was dismissed on July 12, 1977, the New Jersey Supreme Court held that although at the time of the commencement of the instant foreclosure Notice by mail was not by State Statute, Rule of Court or otherwise essential, required or mandated, since Notice was, in fact, and regardless of the lack of requirement to do so, sent by regular mail (although admittedly not received by Appellants), the instant foreclosure proceeding suffered from no Federal or State constitutional infirmity and as against these Appellants and as applied to them, the New Jersey In Rem Tax Foreclosure Act was valid.

The question thus presented is:

> Should the constitutional sufficiency of New Jersey In Rem Tax Foreclosure proceedings be judged by the constitutional validity of the notice provisions of the statute which authorizes and governs the foreclosure action or by the nonmandatory municipal notice which is by happenstance and favor actually given to the taxpayer?

STATEMENT OF CASE.

The City of Atlantic City, after the institution of an In Rem Tax Foreclosure proceeding on January 8, 1973, took title to the Appellants' real estate by Judgment by Default on May 23, 1973. The foreclosure proceeding was initiated and concluded by Atlantic City in accordance with New Jersey's In Rem Tax Foreclosure Act, known as N. J. S. A. 54:5-104.29, *et seq*.

The In Rem Tax Foreclosure Act, as adopted by the New Jersey Legislature in 1948, provided for the foreclosure by municipalities of Tax Sale Certificates held by them for the purpose of summarily barring any rights of redemption in the lands embraced in such Tax Sale Certificates. In New Jersey, this procedure is available only to municipalities.

With respect to the essential and mandatory provisions for Notice of the institution of the foreclosure action to the landowner, the Act merely provides that Notice of such foreclosure be published in a newspaper generally circulated in the municipality where the lands affected are located on *one* occasion and that within fifteen (15) days after the date of the publication of the Notice a copy thereof be posted in the Office of the Tax Collector, in the Office of the County Recording Officer and, as well, in three other conspicuous places within the taxing district in which the land is located. New Jersey Supreme Court Rules 4:64-7(b)(d).

Conspicuously absent from the Act or the Rules of Court promulgated pursuant to it are the mandatory requirements of a posting on the land actually to be affected, of any notice regarding the institution of said action or of a mailing by any means of said Notice to the person who appears on the municipality's last Tax Duplicate as the owner of record or person to be affected by foreclosure.

Despite the absence of the mailing of Notice requirement, Atlantic City contended it had, by regular mail, forwarded such Notice to the Appellants, although it did concede that no person or entity ever had received the Notice because the mailing had been returned to the City marked "undeliverable as addressed."

On November 3, 1973, after the discovery of the preceding events, the Appellants filed a Motion in the Chancery Division of the Superior Court of New Jersey to reopen and set aside the Judgment by Default, alleging the constitutional insufficiency of the Notice provisions of the In Rem Tax Foreclosure Act generally and as applied to them. The main basis of the constitutional attack was the lack in the In Rem Tax Foreclosure Statute of a mailing requirement with respect to the Notice of institution of said foreclosure proceeding. This argument was rejected by the Chancery Division of the Superior Court of New Jersey and by the Appellate Division of the Superior Court of New Jersey, where an appeal was filed thereafter. Both forums felt bound by the earlier decision of the New Jersey Supreme Court in *City of Newark v. Yeskel*, 5 N. J. 313 (1950). Both Courts did construe the In Rem Tax Foreclosure Statute and Rules of Court promulgated pursuant thereto as not requiring mailing by any means of such Notice to the person so listed on the foreclosing municipality's last Tax Duplicate.

Thereafter, a Petition For Certification was filed with and granted by the New Jersey Supreme Court. At or about the same time, a Petition was also granted by that Court in what eventually became the companion case of *Township of Montville*.

Regardless of the Supreme Court's holding in *Township of Montville* that the Notice provisions of the In Rem Tax Foreclosure Act were contrary to Article 1, Paragraph 1 of the New Jersey Constitution and equally repugnant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution, four (4) Justices of the Court felt that since Atlantic City had mailed such Notice —although not statutorily or otherwise required or compelled to do so—the validity of the foreclosure proceeding

and, in fact, the validity of the In Rem Tax Foreclosure Statute, had to be judged by the Notice which was actually given the Appellants and not by the Notice prescribed under the statute. These Justices of the New Jersey Supreme Court so concluded for two reasons.

First, they felt that this Court's opinion as expressed in *Wuchter v. Pizzutti*, 276 U. S. 13, 24, – S. Ct. –, 72 L. Ed. 446, 451 (1928); *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424-25, 35 S. Ct. 625, 59 L. Ed. 1027, 1031-32 (1915); *Security Trust & S. V. Co. v. Lexington*, 203 U. S. 323, 333, 27 S. Ct. 87, 51 L. Ed. 204, 208 (1906); and in *State v. Standard Oil Company*, 5 N. J. 281 (1950) (Vanderbilt, J., dis.), Aff. on other grounds, 341 U. S. 428, 71 S. Ct. 822, 95 L. Ed. 1078 (1951), had been "abandoned" by the United States Supreme Court in *Botens v. Aronauer*, 414 U. S. 1059, 94 S. Ct. 562, 38 L. Ed. 2d 464 (1973), dis. app. from 32 N. Y. 2d 243, 344 N. Y. S. 2d 892, 298 N. E. 2d 24 (1973) (P. A6 of Appendix A).

Secondly, the Court attempted to draw a distinction between the instant case and the facts of *Wuchter v. Pizzutti, supra*, and in the main indicated that since New Jersey Rule of Court 4:64-7(c) contained a directory (admittedly as distinct from mandatory) provision *permitting* the mailing of Notice of institution of suit to of-record property owners, it was sufficient to support the Judgment of Foreclosure below because Notice was actually mailed to the address listed on Atlantic City's tax records (P. A6 and A7 of Appendix A).

Accordingly, the New Jersey Supreme Court held on June 9, 1977, as applied to these Appellants, that the In Rem Tax Foreclosure Act of the State of New Jersey was constitutionally valid (P. A7 of Appendix A).

Thereafter, a Petition For Reconsideration was filed by the Appellants with the New Jersey Supreme Court, but that Petition was dismissed on July 12, 1977.

SUBSTANTIALITY OF FEDERAL QUESTION.

The issue in this matter is *not* whether the New Jersey In Rem Tax Foreclosure Statute is *generally* constitutional. Indeed, the general unconstitutionality of that statute has already been decided by the New Jersey Supreme Court in *Township of Montivlle.*

Rather, this Court is called upon to reverse the New Jersey Supreme Court's simultaneous application of inconsistent and contradictory constitutional standards which led to the anomalous result below whereby that Court held that the New Jersey In Rem Tax Foreclosure Statute as applied to the Appellants was constitutional, despite that Court's clear recognition that:

1. The New Jersey In Rem Tax Foreclosure Statute fails to make Notice of the institution of said proceedings by mail mandatory (Pp. A17, footnote 1 and A33, footnote 8 of *Township of Montville* contained in Appendix D).

2. That the In Rem Tax Foreclosure Statute of the State of New Jersey does not make provision for communication to the proposed defendant such as to create reasonable probability that he will be made aware of the institution of the foreclosure suit (Pp. A29 and A30 of *Township of Montville* contained in Appendix D).

3. That based on decisions of the United States Supreme Court itself, the New Jersey In Rem Tax Foreclosure Statute violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution and based on those same decisions it is repugnant to Article 1, Paragraph 1 of the New Jersey State Constitution (P. A31 of *Township of Montville* contained in Appendix D).

4. That while its decision in *Township of Montville* was limited to the constitutionality of the In Rem Foreclosure proceedings, even under the statutory scheme, it is possible for a taxpayer not even to receive notice that his property is the subject of the tax sale which preceeds foreclosure. In this respect, the Supreme Court of New Jersey noted that New Jersey Statutes Annotated 54:5-27, while providing for notification to known owners that the property is to be sold and a Tax Certificate issued, further indicates that:

> "[F]ailure to mail the Notice shall not invalidate any proceedings hereunder." (P. A17, footnote 1 of *Township of Montville,* contained in Appendix D).

5. That the Appellants' challenge *is* actually to the Notice allegedly required to transfer interest to the real estate to the Appellee (Pp. A19 and A20, footnote 5 of *Township of Montville* contained in Appendix D).

However, because in the present instance the Appellants, by favor and happenstance, were mailed Notice,[1] the New Jersey Supreme Court held the In Rem Tax Foreclosure Statute constitutional as applied to them.

Such a ruling flies in the face of a beadroll of decisions of this Court which have held that extra-official or casual Notice granted as a matter of favor or discretion cannot be deemed a substantial substitute for the Due Process of

1. The Notice itself was never ordered produced despite a request to the New Jersey Supreme Court to order a remand for that express purpose. The Appellee never indicated to the Court until *after* the Motion For Reconsideration and Remand was filed that the Notice enclosed in its original envelope had been returned to it marked "Undeliverable as addressed", thus finally admitting that no person or entity had, in fact, ever received same.

Law that the Constitution requires. *Coe v. Armour Fertilizer Works, supra.* This and other decisions of the United States Supreme Court have clearly indicated that the Notice provided for must be provided for as an *essential* part of the statutory scheme and a statute can have no life if the Notice actually given or awarded was done so as a mere matter of favor or grace. *Central of Georgia R. Co. v. Wright,* 207 U. S. 127, 138, 141 S. Ct. 47, 52 L. Ed. 134. 141 (1907). On another occasion, this Court has had the opportunity to rule that the right of a citizen to Due Process of Law must rest upon a basis more substantial than favor or discretion in terms of Notice due. *Roller v. Holly,* 176 U. S. 398, 409, 20 S. Ct. 410, 44 L. Ed. 520, 524 (1900).

Of course, while the "Notice" provision in question, namely, N. J. S. A. 54:5-104.48, does indicate that Notice of the foreclosure *may* be mailed to such persons, it provides immediately thereafter that:

> ". . . but neither the failure to mail any such Notice, nor the failure of any persons to receive such Notice, shall affect the validity or any action brought pursuant to this Act."

It is thus clear that this "Notice" provision certainly cannot be deemed as an essential part of the statutory scheme and the only issue which is left unclear is why the New Jersey Legislature even added same to the statute when at the same time it indicated that municipalities only had to mail Notice if they wanted to and that if they decided not to, it would have absolutely no meaning, force or effect in terms of the validity of any foreclosure judgment thereafter obtained. Indeed, this can be hardly deemed as a "Notice" provision at all.

Equally as substantial and erroneous is the New Jersey Supreme Court's decision that the holdings of this Court

in *Wuchter v. Pizzutti,* 276 U. S. 13, 24, – S. Ct. –, 72 L. Ed. 446, 452 (1928); *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 424-425, 35 S. Ct. 625, 59 L. Ed. 1027, 1031-32 (1915); *Security Trust & S. V. Co. v. Lexington,* 203 U. S. 323, 333, 27 S. Ct. 87, 51 L. Ed. 204, 208 (1906) have been "abandoned" by this Court's decision in *Botens v. Aronauer,* 414 U. S. 1059, 94 S. Ct. 562, 38 L. Ed. 2d 464 (1973), dis. app. from N. Y. 2d 243, 344 N. Y. S. 2d 892, 298 N. E. 2d 24 (1973).

It is respectfully submitted that if this Court overruled the substantial number of its prior decisions cited above, it would have so indicated. None of these decisions were even mentioned in this Court's disposition of *Botens v. Aronauer, supra,* in which case this Court merely dismissed same for want of a substantial Federal question.

Furthermore, The New Jersey Supreme Court, in its alternative position, attempted to distinguish the controlling decision of *Wuchter v. Pizzutti, supra* from the instant case by indicating that since in the present instance there was a provision for Notice (albeit and admittedly a directory one only) and because in *Wuchter, supra* there was not, the Notice so given provided for constitutional sufficiency such as to make the New Jersey In Rem Tax Foreclosure Statute constitutional as applied to these Appellants. What the New Jersey Supreme Court failed to perceive and actually read was the actual language in *Wuchter* itself wherein this Court indicated that the statute therein questioned did not contain any provision "requiring" such Notice.

It is the *mandatory* requirement of Notice which must exist in statutory enactments in order to supplant constitutional sufficiency—not the mere existence of a meaningless provision which, at best, discourages the very Notice it allows by indicating that the failure to provide such Notice will not invalidate the proceeding.

Accordingly, the ruling of the New Jersey Supreme Court in the instant matter was totally repugnant to substantial prior holdings of this Court and constitutes a major departure from sound and consistent rulings interpreting and applying the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Even those three (3) Justices of the New Jersey Supreme Court who dissented in the companion case of *Township of Montville*, feeling that generally the New Jersey In Rem Tax Foreclosure Act was constitutional, indicated in their concurring opinion in the instant matter that:

> "[W]e doubt whether the Court has satisfactorily dissipated the *Wuchter Bar* against denial of relief to Appellant consistent with its adjudication of the invalidity of our In Rem Tax Foreclosure Statute on Due Process grounds. (Appendix B, P. A10)

There can be no doubt that the question presented to this Court is very substantial, affecting, as it does, inconsistent applications of agreed-upon Due Process principles. To allow this inconsistency to go unresolved would continue to allow wholly unconstitutional State and Federal Statutes, upon attack, to gasp one last breath—and for the justified attacker to find his cause won but his constitutional rights lost.

CONCLUSION.

The Court should take jurisdiction of this appeal.

Respectfully submitted,

STEPHEN HANKIN,
One South New York Avenue,
Atlantic City, New Jersey. 08401
Attorney for Appellants.

APPENDIX A.

SUPREME COURT OF NEW JERSEY

A-32 September Term 1976

CITY OF ATLANTIC CITY, in the County of Atlantic, a Municipal Corporation of the State of New Jersey,
Plaintiff-Respondent,

v.

BLOCK C-11, LOT 11,
Defendant,

and

ROSE SCHOENTHAL,
Appellant.

Argued October 25, 1976—Decided June 9, 1977.

On certification to the Superior Court, Appellate Division.

Mr. Stephen Hankin argued the cause for appellant.

Mr. Daniel J. Dowling argued the cause for respondent (*Mr. Murray Fredericks*, attorney).

The opinion of the Court was delivered by
PASHMAN, *J.*

This is a companion case to *Township of Montville v. Block 69, Lot 10, et al.*, -- N. J. — (1977) decided this day. Although the landowner in this case similarly chal-

lenges the constitutionality of notice requirements embodied in the In Rem Tax Foreclosure Act, *N. J. S. A.* 54:5-104.29 *et seq.*, she also questions the applicability of that statute to her property and asserts various procedural reasons in support of her motion to reopen a final judgment of foreclosure in favor of the plaintiff, City of Atlantic City, under the Act. Both lower courts denied her motion, and we granted certification, 69 *N. J.* 394 (1976). We affirm the denial of appellant's motion.

I

This suit involves a parcel of land designated as Block C-11, Lot 11 on the Atlantic City tax map. The Synor Company purchased the property on April 12, 1938. Although that corporation subsequently became defunct, municipal tax records have always listed the record owner of the property as "Synor Co.," with a mailing address of "Hotel Mark, 3100 Pacific Ave., Atlantic City, N. J."

The appellant, Mrs. Rose Schoenthal, filed an affidavit asserting that the property had previously been owned by her husband, Sylvan Schoenthal. She alleges that he conducted a hotel on the premises until 1960, when they were divorced. She asserts that, although no deed ever passed to her and the property technically still belongs to the defunct corporation, as "part of the divorce proceedings . . . the property in question ° ° ° became [her] property." In support of her claim that she is the real party in interest, she states that since 1960 she has continuously dealt with the parcel as her own, paying taxes on it from 1960 to 1965. She applied for a tax deduction in her own name in 1962 and 1964, and received a refund in 1963 for an overpayment on her 1961 property tax. In 1972, appellant obtained a municipal permit and demolished the deteriorating building. Later that year she applied for and

received a reduction in her building assessment from $49,100 to $25,000.

The arrearages on the property began to accumulate as early as 1965. Appellant received a notice of default with her 1967 tax bill and a warning that her property might be sold for unpaid taxes. The City did in fact conduct a tax sale of the premises on September 19, 1967, purchasing the property itself for unpaid 1966 taxes plus interest aggregating $5,209.40. A tax sale certificate noting the sale was recorded on January 15, 1968.

Mrs. Schoenthal paid no part of the 1966 or any subsequent tax bills. As of November 30, 1972, the total taxes and interest due amounted to $52,579.57. She alleges that the property was worth $135,000 at that time. Appellant contends that she offered to pay $5,000 toward her tax bill on July 10, 1970, but was refused by the Deputy Tax Collector. In an answering affidavit, he denied appellant's allegations and asserted that had she offered to pay any part of the taxes, he would have referred her to the Tax Collector or the Director of Revenue and Finance.

On January 8, 1973 the City instituted *in rem* tax foreclosure proceedings to bar any rights of redemption in the property. Both the complaint in the action and the foreclosure notice listed Synor Co. as the "record owner" and the "transferee of purchaser of title." *R.* 4:64-7. This notice was published and posted in accordance with *N. J. S. A.* 54:5-104.42 and *R.* 4:64-7(b), (d). Additionally, an affidavit was filed on behalf of the City alleging that a copy of the foreclosure notice was mailed on February 24, 1973 "to each person whose name appears as an owner in the Tax Foreclosure List, at his last known address as it appears on the last municipal tax duplicate ° ° °."

The Chancery Division entered a final judgment of foreclosure on May 23, 1973. Claiming to have learned of the proceeding in late September, Mrs. Schoenthal filed a

motion to vacate the judgment on November 3, 1973. It was denied on March 30, 1974. In an unreported opinion, the Appellate Division affirmed the trial court's denial of the motion, holding (1) that appellant had no standing to contest the foreclosure; (2) that the notice provisions of the foreclosure act were constitutional under *City of Newark v. Yeskel*, 5 *N. J.* 313 (1950), and that the City was not bound to send notice of the proceeding to her; (3) that her alleged tender of part payment, even if proven, would not have affected the validity of the proceeding; and (4) that the Act was intended to authorize foreclosure of all real property, not just vacant land, for tax arrearages.[1]

II

Appellant's primary argument is that she has been denied procedural due process under the foreclosure statute. As in *Montville v. Block 79, Lot 10, et al., supra,* this contention is grounded on the statute's failure to require individualized notice to taxpayers of record. However, a major difference between the facts of this appeal and those presented in that companion case turns upon the notice which was actually given to the Synor Co. as the owner of record.

Appellant in this case has made no attempt to rebut the City's assertion that it sent notice by mail to each person whose name appeared on the Tax Foreclosure List. See *ante* at A3. She concedes that title to the property has been continuously recorded in the municipal tax roles under the name "Synor Co." and

1. Since we find no merit in each of appellant's substantive challenges to the judgment of foreclosure, we have not addressed the procedural issues which she raises: (1) that she had standing to contest the validity of the foreclosure, and (2) that it was an abuse of discretion to refuse to reopen the foreclosure after the statutory three-month period for doing so expired. *N. J. S. A.* 54:5-104.67.

that the company's address has been listed as "Hotel Mark, 3100 Pacific Avenue." However, she contends that the City made it a practice to send two sets of tax bills, one to the company at its official address and another to her at her home address. She also notes that the City was apprised of her claim to the property through her attorney's efforts to reduce the building's assessment in 1972. Thus, she argues that additional notice of the foreclosure proceeding should have been sent directly to her address or to her attorney's address.

Mrs. Schoenthal's argument goes substantially beyond the Supreme Court's holding in *Mullane*, and would place on a municipality the affirmative duty of ascertaining whether the name and address listed on its tax roles are correct. In *Mullane* the Court recognized that administrative limitations might hamped notification efforts, and stated that "impracticable and extended searches are not required in the name of due process." 339 *U. S.* at 317-18; 94 *L. Ed.* at 875. Significantly, the Court there overruled any constitutional objections to published notice raised on behalf of persons whose interests or addresses were unknown, and limited relief to "known present beneficiaries of known place of residence." *Id. See also, Nelson v. New York,* 352 *U. S.* 103, 108, 77 *S. Ct.* 195, 1 *L. Ed.* 2d 171, 175 (1956) (rejecting a similar argument that municipal authorities "should have known from the state of the records . . . that mailed notice would probably be ineffective.").

Alternatively, appellant relies on the motion that the validity of the foreclosure proceedings must be judged by the notice prescribed under the statute, and not by that which may have actually been given. Various cases have adhered to this position. *E.g., Wuchter v. Pizzutti,* 276 *U. S.* 13, 24, – *S. Ct.* – , 72 *L. Ed.* 446, 452 (1928); *Coe*

v. Armour Fertilizer Works, 237 *U. S.* 413, 424-25, 35 *S. Ct.* 625, 59 *L. Ed.* 1027, 1031-32 (1915); *Security Trust & S. V. Co. v. Lexington,* 203 *U. S.* 323, 333, 27 *S. Ct.* 87, 51 *L. Ed.* 204, 208 (1906); *Rixner v. White,* 417 *F. Supp.* 995, 997 (D. N. D. 1976); *State v. Standard Oil Co.,* 5 *N. J.* 281 (1950) (Vanderbilt, J., dissenting), aff'd on other grounds, 341 *U. S.* 428, 71 *S. Ct.* 822, 95 *L. Ed.* 1078 (1951); *Weiner v. Wittman,* 129 *N. J. L.* 35 (Sup. Ct. 1942). *But see, Aikins v. Kingsbury,* 247 *U. S.* 484, 489, 38 *S. Ct.* 558, 62 *L. Ed.* 1226, 1229 (1918); *Wuchter v. Pizzutti, supra,* 276 *U. S.* at 28, 72 *L. Ed.* at 453 (Brandeis, Holmes, JJ., dissenting). *But cf., Harris v. Balk,* 198 *U. S.* 215, 227, 228, 25 *S. Ct.* 625, 49 *L. Ed.* 1023, 1028 (1905). However, this position seems to have been abandoned by the United States Supreme Court in *Botens v. Aronauer,* 414 *U. S.* 1059, 94 *S. Ct.* 562, 38 *L. Ed.* 2d 464 (1973), dismissing appeal from 32 *N. Y.* 2d 243, 344 *N. Y. S.* 2d 892, 298 *N. E.* 2d 24 (1973). Although the latter case involved a challenge to a statute which prescribed only published notice, it was dismissed for want of a substantial federal question because, as here, notice by mail was actually sent. See *Montville v. Block 69, Lot 10, et al.,* — *N. J.* at — (slip opinion at —).

Furthermore, the principal case upon which appellant relies—*Wuchter v. Pizzutti, supra*—involved a scheme which failed to make any provision for constitutionally adequate notice. Thus, the Court was able to say that since the notice which was actually given in that case was not contemplated by the statute, it could not "supply constitutional validity to the statute or to service under it." 276 *U. S.* at 24; 72 *L. Ed.* at 452. Apparently, the Court concluded that the failure to provide anywhere for adequate notice was a jurisdictional defect which made the lower court's judgment in that case void. See *Driscoll v. Burlington-Bristol Bridge Co.,* 8 *N. J.* 433, 492-93 (1952).

Jurisdiction in the present case, however, may be sustained under the Court Rule governing notice in foreclosure actions, *R.* 4:64-7(c). Though this provision may be only directory, it is sufficient to support the judgment of foreclosure below since notice was actually mailed to the address listed on the tax records.

III

Finally, we address appellant's contentions that the In Rem Tax Foreclosure Act did not apply to the property in question, and that her offer to pay part of her taxes in July 1970 prevented the municipality from foreclosing her right of redemption.

The suggestion that the Act authorizes the foreclosure of liens only on vacant land is clearly without merit. Her argument, which is based on earlier drafts of the present legislation, fails to explain satisfactorily why the explicit language of the statute should not be followed. *N. J. S. A.* 54:5-104.35 empowers a municipality to foreclose "*any* of the tax sale certificates held by it." [Emphasis added.] Furthermore, it states that the municipality shall list the "lands" against which the proceedings are instituted, specifically defining "land" to include "all real property." We note that this same argument was considered and rejected by the court in *Newark v. Block 86, Lot 30, et al.,* 94 *N. J. Super.* 468 (Ch. Div. 1967).

Reliance on appellant's alleged tender of $5000 to reduce the arrearages is equally unhelpful. Essentially, she argues that by offering to pay a part of her taxes on July 10, 1970, she prevented the municipality from lawfully instituting foreclosure proceedings on January 8, 1973. This argument is based upon *N. J. S. A.* 54:5-104.35, which under a previous version, prohibited a municipality from instituting a foreclosure action if any part

of the taxes assessed against the land had been paid within the last four years.

In 1968, however, the statute was amended to allow foreclosure proceedings to be instituted where *"any portion* of the general land taxes levied and assessed against the land for 48 months next preceding the commencement of the action . . . *remains unpaid."* *L.* 1968, *c.* 464. [Emphasis added.] [2] This provision became effective on February 21, 1969, well before the instant action was instituted. Since her alleged tender could hardly have satisfied all of her tax obligations for the requisite time period, see *ante* at A3, we need not consider whether the Appellate Division was correct in refusing to equate a tender of part payment with a tax payment under the statute. Moreover, we need not consider whether the alleged tender ever occurred.

The judgment of the Appellate Division is hereby affirmed.

2. Although of no significance to the arguments in this case, *N. J. S. A.* 54:5-104.34, was amended again by *L.* 1974, *c.* 91, § 5, this time reducing the time period to 21 months.

APPENDIX B.

SUPREME COURT OF NEW JERSEY

A-32 September Term 1976

CITY OF ATLANTIC CITY, in the County of Atlantic, a Municipal Corporation of the State of New Jersey,
Plaintiff-Respondent,

v.

BLOCK C-11, LOT 11,
Defendant,

and

ROSE SCHOENTHAL,
Appellant.

CONFORD, *P. J. A. D.* (temporarily assigned), concurring in result.

In this case the Court denies appellant the right of redemption from a tax foreclosure judgment of certain realty beneficially owned by her notwithstanding that it has, in a companion case decided today,[1] held the In Rem Tax Foreclosure Act (1948), *N. J. S. A.* 54:5-104.29 *et seq.*, unconstitutional to the extent that it does not require mailing of notice of the foreclosure to the person last shown as owner on the city's tax records. The Court so rules on the ground that, according to the record in this case, notice was in fact mailed to the corporation which was the taxpayer of record at the address of record. The Court rejects appellant's argument that under the leading case of

1. *Township of Montville v. Block 69, Lot 10,* etc.

Wuchter v. Pizzutti, 276 *U. S.* 13, 24 (1928), due process will be held to have been denied if proper notice is not commanded by the applicable statute although in fact actually given. The Court considers that the *Wuchter* rule has been abandoned by the United States Supreme Court (slip opinion p. 8).

I doubt whether the Court has satisfactorily dissipated the *Wuchter* bar against denial of relief to appellant consistent with its adjudication of the invalidity of our *In Rem* tax foreclosure statute on due process grounds. But I need not come to a conclusion on the point as I disagree with the Court's decision on the matter of the constitutionality of the statute for the reasons set forth at length in my dissenting opinion in the *Township of Montville* case. As I deem the statute entirely unexceptionable and as it was followed in the present case in respect of publication and posting of notice, I regard appellant's position in this regard as without merit.

Appellant's other points are without merit.

As to the contention that the act authorizes foreclosure only on vacant lands, I concur in the Court's disposition of the point.

Appellant also argued in the lower courts that since she had tendered $5,000 on account of the arrearages on July 10, 1970, the institution of the foreclosure on January 8, 1973 violated the asserted requirement of *N. J. S. A.* 54:5-104.34 that all taxes assessed against the land for the four years preceding the commencement of the action be unpaid. Appellant's affidavit averred that she visited the tax office to make payment of taxes on another property she owned (her brief fixes the date as July 10, 1970) and tendered $5,000 on account of the arrearages on the subject property. This was refused by a Mr. Burns who said that full payment was required. Mr. Burns, Deputy Tax

Collector, filed an answering affidavit denying any tender by appellant of any sum. He stated that the established practice, in the event of a tender of part payment, would have been for him to refer the request to the Tax Collector or the Director of Revenue and Finance.

In my view of the applicable law, appellant's contention has no substance even if her assertion of tender of part payment is accepted as true. In the first place, *N. J. S. A.* 54:5-104.34 was amended by *L.* 1968, *c.* 464 to preclude institution of the action "unless * * * [a]ll or any portion of the general land taxes levied and assessed against the land for 48 [2] months next preceding the commencement of the action * * * remains unpaid." Since realty taxes are payable quarterly on the first days of February, May, August and November of the current year, after which they are delinquent, *N. J. S. A.* 54:4-66, institution of the instant foreclosure on January 8, 1973 would have been precluded, insofar as the applicable section is concerned, only if part or all of the quarterly tax obligations due for each of the 16 quarters preceding January 8, 1973 (date of institution of the foreclosure) was unpaid on that date. The sixteenth preceding quarterly obligation was that due November 1, 1968.

Assuming the city had accepted appellant's tender of $5,000 in July 1970 it would have been the city's right and duty to apply the payment first to the tax obligation for which the tax sale took place, *i.e.*, the lien for 1966. *N. J. S. A.* 54:5-58; *cf. State v. Erie Railroad Co.*, 23 *N. J. Misc.* 203, 212 (Sup. Ct. 1945). This amounted to $5,209.40 plus additional interest as of July 10, 1970 of $1,167.95, or a total of $6,377.35. The alleged tender of $5,000 was obviously insufficient even to discharge the

2. The figure "48" was changed to "21" by amendment in *L.* 1974, *c.* 91, sec. 5.

1966 obligation, much less those for any of the tax quarters owing on and after November 1, 1968. The position of the appellant in this regard is thus undermined even if one accepted her affidavit as true. There is the further consideration that the only express provision in the statutes authorizing part payment on account of delinquent taxes is that set forth in *N. J. S. A.* 54:5-19, which permits a municipality by resolution to agree to accept payment of delinquencies in installments over five-year periods. No such resolution was ever adopted as to this property.

Justice Mountain and Justice Clifford join in this opinion.

APPENDIX C.

SUPREME COURT OF NEW JERSEY

M-1028 SEPTEMBER TERM, 1976

CITY OF ATLANTIC CITY,
Plaintiff-Respondent,

v.

BLOCK C-11, LOT 11,
Defendant,

and

ROSE SCHOENTHAL,
Defendant-Movant.

ORDER.

No member of the Court who voted with the majority moving for reconsideration, the motion is dismissed.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 12th day of July, 1977.

/s/ FLORENCE R. PESKOE
Clerk

APPENDIX D.

SUPREME COURT OF NEW JERSEY

A-33 September Term 1976

TOWNSHIP OF MONTVILLE, a Municipal Corporation in the County of Morris and State of New Jersey,
Plaintiff-Respondent,

v.

BLOCK 69, LOT 10, assessed to Anton Spitz and Ida Spitz,

BLOCK 56, LOT 16, assessed to John H. Hixson,

BLOCK 98, LOT 12, assessed to Wayne P. and Sue Ann Van Duyne,
Defendants,

and

BLOCK 39, LOTS 1, 75B, 75C, 90, 91 and 92, assessed to Montville Industrial Park, Inc.,
Defendant-Appellant

Argued October 25, 1976—Decided June 9, 1977

On certification to the Superior Court, Appellate Division.

Mr. Martin M. Friedman argued the cause for appellant (*Messrs. Friedman, Kates, Uscher & Pearlman*, attorneys).

Mr. Lawrence K. Eismeier argued the cause for respondent (*Messrs. Young & Sears*, attorneys).

The opinion of the Court was delivered by
PASHMAN, *J.*

This case involves the constitutionality of the notice procedures prescribed by the In Rem Tax Foreclosure Act, *N. J. S. A.* 54:5-104.29 *et seq.* The corporate landowner, which moves to reopen a final judgment of foreclosure by the municipality, argues that the act's requirement of notice by publication and posting fall short of constitutionally guaranteed procedural due process. In doing so, it challenges the continued viability of this Court's decision in *City of Newark v. Yeskel*, 5 *N. J.* 313 (1950), which upheld these procedures against similar constitutional objections.

Both the trial court and the Appellate Division rejected the landowner's constitutional argument. In affirming the Law Division's denial of the taxpayer's motion, the Appellate Division noted that *Yeskel* was controlling and stated that any change in its holding had to be made by this Court. We granted certification, 69 *N. J.* 392 (1976). For the reasons set forth below, we reverse. We hold that the notice provisions of the In Rem Tax Foreclosure Act are unconstitutional under the State and Federal Constitutions and therefore we are constrained to overrule *Yeskel*.

I

This appeal originates from a complaint filed by the plaintiff Township of Montville on May 8, 1973 pursuant to the In Rem Tax Foreclosure Act, *N. J. S. A.* 54:5-104.29 *et seq.* The complaint sought to bar all rights of redemption to various pieces of property, including six parcels of land assessed to the instant landowner, Montville Industrial Park, Inc. As required under the Act, *N. J. S. A.*

54:5-19 *et seq.*, each of the parcels had previously been the subject of a tax sale: one tax sale certificate, indicating that a parcel had been sold to the municipality for unpaid taxes, was recorded on December 26, 1967; tax sale certificates for the remaining parcels, also indicating their sale to the municipality, were recorded on January 13, 1967.

Prior to instituting the foreclosure action, the municipality had given the taxpayer several warnings that taxes on the properties in question had not been paid. In compliance with requests by the corporate landowner, the township tax collector mailed statements of tax arrearages to the landowner on June 3, 1971, June 22, 1972 and March 28, 1973. The first statement advised the taxpayer that "[i]f the properties are to be redeemed, please contact this office as soon as possible as they are in the hands of our attorney and in the process of foreclosure." The second letter noted that the most heavily assessed parcel "may not be redeemable, [and] must be checked with attorney." [sic]

Neither these letters nor any other communications actually informed the taxpayer that a complaint had been filed seeking to permanently bar it from exercising its statutory right to redeem the property. Although the tax collector knew the address of the corporation, he followed the mandatory provisions of the *in rem* statute, which only require notice by posting and publication.[1] On August 1,

1. *N. J. S. A.* 54:5-104.42 provides that a copy of the complaint filed in the office of the county recording office, together with publication and posting of notice, "shall be notice to the world including all persons claiming any right, title, interest in or lien upon the land sought to be affected by said complaint, whether or not the names of said persons appear in said complaint. . . ." *N. J. S. A.* 54:5-104.48 provides for notice to owners who request in writing within the previous five year period that they wish to receive notice of foreclosure. However, it also states that failure to send such notice does not invalidate any action brought pursuant to the Act.

1973 a final judgment of foreclosure was entered barring the taxpayer's right of redemption. As of April 1, 1973, the total taxes, interest and other charges against the property amounted to $79,092.17. Its assessed value for 1974 was $306,100.

A timely motion to reopen the judgment was filed by the corporation on October 25, 1973. In addition to attacking the constitutionality of the Act, it also alleged various procedural irregularities.[2] Subsequently, counsel for the corporation offered to settle the matter by paying all back taxes, interest, costs and fees. This offer was informally accepted by the municipality but later rejected. On May 21, 1974 an order denying the taxpayer's motion was entered.

II

The question which this case presents is whether or not notice by publication is constitutional in a foreclosure of tax delinquent premises where the municipality pos-

1. (Cont'd.)
Under the Court Rules, which also govern these procedures, mailing notice to each person whose name appears as an owner in the tax foreclosure list is permissive. *R.* 4:64-7(c).

While our decision today is limited to the constitutionality of the *in rem* foreclosure procedures, we note that under the statutory scheme it is possible for a taxpayer not even to receive notice that his property was the subject of the tax sale which precedes foreclosure. *N. J. S. A.* 54:5-27 does not provide for notification of known owners when the property is to be sold and a tax certificate issued, but adds that "[f]ailure to mail the notice shall not invalidate any proceedings hereunder."

2. Specifically, the taxpayer alleged that the complaint filed against its property was defective. It argued that the municipality failed to comply with *R.* 4:64-7(a), which requires the complaint to set forth the "book and page or date and instrument number of the instrument by which the [landowner] acquired title." Additionally, it argued that the complaint had failed to include certain words required under *R.* 64-7(b). Since we hold that the notice procedures mandated by the statute are unconstitutional, we need not consider these alleged irregularities.

sesses the name and address of the owner but fails to give notice by mail or otherwise to that address. As in other cases involving due process claims, the Court must first decide whether the Due Process Clause applies to this type of governmental action, and then determine "what process is due." *Morrissey v. Brewer*, 408 *U. S.* 471, 481-483, 92 *S. Ct.* 2593, 33 *L. Ed.* 2d 484, 494-495 (1972); *Dow v. State*, 396 *Mich.* 192, 240 *N. W.* 2d 340, 344 (1976); Note, "Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing," 88 *Harv. L. Rev.* 1510 (1975).

A

It can hardly be doubted that interests in real estate are protected by the Due Process Clause. The Fourteenth Amendment to the Federal Constitution provides: "No State shall make or enforce any law which shall . . . . deprive any person of life, liberty or property, without due process of law." This is consistent with Article 1, par. 1 of our State Constitution, which also protects a person's right to acquire, possess, and protect property.[3] That the property interests mentioned in both Constitutions refer to interests in real estate have been settled by innumerable decisions by both this Court and the United States Supreme Court. *See, e.g., Bd. of Regents v. Roth*, 408 *U. S.* 564, 571-72, 92 *S. Ct.* 2701, 33 L. Ed 2d 548, 557 (1972); *Jones v. Haridor Realty Corp.*, 37 *N. J.* 369, 391 (1962) ("There is no doubt that the right to acquire, own and dispose of real property is within the protective scope of the Four-

3. That provision states:

Natural and unalienable rights

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

teenth Amendment, or that such right is recognized by Article 1, paragraph 1, of our State Constitution.")

Applicability of the Due Process Clause is not affected by the municipality's sale of the property for unpaid taxes and issuance of a certificate to the purchaser. State law, which is controlling on whether or not there is a property interest,[4] uniformly holds that a tax sale alone is not an outright conveyance of the property in question and does not constitute a final irrevocable divestiture of title. *Brewer v. Porch*, 53 *N. J.* 167 (1969); *Newark v. Sue Corp.*, 124 *N. J. Super.* 5, 7 (App. Div. 1973); *Clark v. Jersey City*, 8 *N. J. Super.* 33, 37 (App. Div. 1950). *Cf., Grasso v. Deiter*, 126 *N. J. Super.* 365 (App. Div. 1974). Thus, it has been held that a statute taking away, reducing the time for or otherwise impairing a right of redemption which has already vested, would be an unconstitutional deprivation of property rights. *Harrington Co. v. Chopke*, 108 *N. J. Eq.* 297, 301 (Ch. Div. 1931), aff'd 110 *N. J. Eq.* 574 (E. & A. 1932); *Rodgers v. Cressman*, 98 *N. J. Eq.* 209 (Ch. Div. 1925).

It is beyond question that any procedure which deprives an individual of a property interest must conform to the dictates of the Due Process Clause. *Mathews v. Eldridge*, 424 *U. S.* 319, 333, 96 *S. Ct.* 893, 47 *L. Ed.* 2d 18,

4. The question arises only in the context of whether or not the tax sale which precedes the foreclosure terminates the property interest. The United States Supreme Court has clearly indicated that this type of question can only be answered by reference to state law.

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.
>
> [*Bd. of Regents v. Roth*, 408 *U. S.* at 577, 92 *S. Ct.* at 2709, 33 *L. Ed.* 2d at 561.]

32 (1976); *Bell v. Burson*, 402 *U. S.* 535, 91 *S. Ct.* 1586, 29 *L. Ed.* 2d 90 (1971). Accordingly, the United States Supreme Court has held that procedural due process applies where state law does not entirely extinguish the taxpayers' property interest until foreclosure. *See Nelson v. New York*, 352 *U. S.* 103, 77 *S. Ct.* 195, 1 *L. Ed.* 2d 171 (1956) (tax foreclosure proceeding measured against due process requirements); *Covey v. Somers*, 351 *U. S.* 141, 76 *S. Ct.* 724, 100 *L. Ed.* 1021 (1956) (same).[5]

Although the Supreme Court dismissed an appeal for want of a substantial federal question where the statute in question did utilize the foreclosure procedure to terminate the landowner's interest, *Botens v. Aronauer*, 414 *U. S.* 1059, 94 *S. Ct.* 562, 38 *L. Ed.* 2d 464, dismissing appeal from 32 *N. Y.* 2d 243, 344 *N. Y. S.* 2d 892, 298 *N. E.* 2d

5. These cases are distinguishable from those construing state procedures which do not utilize the foreclosure procedure to extinguish a landowner's property interest. For instance, in *Christie-Stewart, Inc. v. Paschall*, 414 *U. S.* 100, 94 *S. Ct.* 313, 38 *L. Ed.* 2d 298 (1973), vacating and remanding 502 *P.* 2d 1265 (Okla. Sup. Ct. 1972), reh. den. 414 *U. S.* 1138, 92 *S. Ct.* 884, 38 *L. Ed.* 2d 763 (1974), the Court considered an Oklahoma statute, under which the certificate deed (which is analogous to our tax sale proceeding) conveyed absolute title to the property if notice had been given prior to the issuance of the certificate. *See Walker v. Hoffman*, 405 *P.* 2d 57 (Okla. Sup. Ct. 1965). The Court, in vacating the judgment of the Oklahoma Supreme Court and remanding the case, stated that there may have been an independent ground supporting the judgment of the state court. Significantly, the Oklahoma Supreme Court has indicated that the Due Process Clause does apply at the point when the landowner's property interest is terminated, upon issuance of the certificate deed. *Id.*, 502 *P.* 2d at 1268.

Similarly, in *Pearson v. W. P. Dodd*, — *U. S.* —, 97 *S. Ct.* —, 50 *L. Ed.* 2d 574 (1977), the Court was called upon to review another state statute under which the property interest was completely terminated without foreclosure. The Court noted that plaintiff was not challenging the notice required to transfer the interest to the State, but only the procedures by which the State subsequently sold her property to a third person. — *U. S.* — at —, — *S. Ct.* at —, 50 *L. Ed.* 2d at 576-577.

73 (1973), in that case mail notice *was* actually given. See Note, "The Constitutionality of Notice by Publication in Tax Sale Proceedings," 84 *Yale L. J.* 1505, 1510 (1975). The judge in *Wager v. Lind*, 389 *F. Supp.* 213 (S. D. N. Y. 1975) correctly assessed *Botens, supra,* when he said: "I am not prepared to say that the Supreme Court in its summary dismissal did more than declare the lack of a substantial federal question on the *precise facts Botens presented to it.*" *Id.* at 216; emphasis in original. See also, Comment, "The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of Hicks v. Miranda," 76 *Colum. L. Rev.* 508 (1976). In referring to *Botens, supra,* and *Wager, supra,* the Comment states:

> [W]hen the Supreme Court dismisses a challenge to a state statute, it does not necessarily mean that the statute is valid under all circumstances; it signifies only that the challenge is not a 'substantial' one in the precise circumstances of that case.
>
> [76 *Colum. L. Rev.* at 532]

B

Having determined that due process principles apply when the owner's right to redemption is to be terminated, we turn to the remaining question of whether or not notice by publication satisfies the requirements of that clause under state and federal guarantees. We hold that it affords insufficient protection for landowners under both constitutional provisions.

1.

The seminal case in this area is *Mullane v. Central Hanover B. & T. Co.*, 339 *U. S.* 306, 70 *S. Ct.* 652, 94 *L. Ed.* 865 (1950). There it was stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, ° ° ° *The notice must be of such nature as reasonably to convey the required information,* . . . , and it must afford a reasonable time for those interested to make their appearance.
>
> [339 *U. S.* at 314; 94 *L. Ed.* at 873; emphasis supplied.]

In that case the Court considered the sufficiency of notice by publication in a New York Statute governing the administration of trust funds. Since the statute required only notice by publication to *known* trust beneficiaries who might be affected by a proposed pooling of smaller trusts, the Court held the statute unconstitutional under the Fourteenth Amendment. Justice Jackson, writing for the majority, stated:

> As to known beneficiaries of known place of residence, . . . , notice by publication stands on a different footing. Exceptions in the name of necessity, do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.
>
> [339 *U. S.* at 318; 94 *L. Ed.* 875]

Significantly, *Mullane* discarded the fictional distinction between *in rem* and *in personam* actions which had

been utilized as a basis for upholding notice by publication in several decisions decided at the turn of this century.[6] *See, e.g., North Laramie Land Co. v. Hoffman,* 268 *U. S.* 276, 45 *S. Ct.* 491, 69 *L. Ed.* 953 (1925); *Ballard v. Hunter,* 204 *U. S.* 241, 27 *S. Ct.* 261, 51 *L. Ed.* 461 (1907); *Leigh v. Green,* 193 *U. S.* 79, 24 *S. Ct.* 390, 48 *L. Ed.* 623 (1904); *Huling v. Kaw Valley R. & Improv. Co.,* 130 *U. S.* 559, 9 *S. Ct.* 603, 32 *L. Ed.* 1045 (1889); *Winona & St. Peter Land Co. v. Minnesota,* 159 *U. S.* 526, 16 *S. Ct.* 83, 40 *L. Ed.* 247 (1895); *Longyear v. Toolan,* 209 *U. S.* 414, 28 *S. Ct.* 506, 52 *L. Ed.* 859 (1908). Noting that this distinction was more appropriate under the substantive law of property as it existed under the ancient Roman law, the Court foreclosed any contention that procedural due process might depend upon whether an action was technically *in personam* or *in rem.* The Court concluded:

> [W]e think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state.
>
> [339 *U. S.* at 312; 94 *L. Ed.* at 872]

Two months after the United States Supreme Court decided *Mullane,* this Court upheld the constitutionality of the In Rem Tax Foreclosure Act in *City of Newark v. Yeskel,* 5 *N. J.* 313 (1950). Rather than follow the Supreme Court's application of due process principles to

6. *See* Note, *supra,* 84 *Yale L. J.* at 1506 *et seq.;* Note, "Requirements of Notice in In Rem Proceedings," 70 *Harv. L. Rev.* 1263-64 (1957); Note, "Due Process in Tax Sales in New York: The Insufficiency of Notice by Publication," 25 *Syr. L. Rev.* 769 (1974).

in rem proceedings, this Court distinguished *Mullane*. It attempted to draw a distinction between notice required in a "proceeding by a political subdivision of the state to enforce the payment of taxes which have been regularly assessed and levied," and other proceedings which impinge less directly on governmental interests, such as the trust account procedure implicated in *Mullane*. 5 *N. J.* at 321. In light of subsequent decisions applying the general principles announced in *Mullane* to a wide variety of proceedings which impinge directly on governmental interests, this distinction can no longer be considered tenable. *See, e.g., Robinson v. Hanrahan,* 409 *U. S.* 38, 93 *S. Ct.* 30, 34 *L. Ed.* 2d 47 (1972) (notice by certified mail to automobile owner's home violated due process in forfeiture proceedings where the state knew that the owner was being held in the county jail); *Schroeder v. New York,* 371 *U. S.* 208, 83 *S. Ct.* 279, 9 *L. Ed.* 2d 255 (1962) (posting near premises and publication insufficient notice in condemnation proceeding); *Walker v. Hutchinson,* 352 *U. S.* 112, 77 *S. Ct.* 200, 1 *L. Ed.* 2d 178 (1956) (newspaper publication alone violates due process in condemnation proceeding); *New York v. New York, N. H. & H. R. Co.,* 344 *U. S.* 293, 73 *S. Ct.* 299, 97 *L. Ed.* 333 (1953) (publication insufficient notice under bankruptcy reorganization). In none of the above cases did the Court find that publication was a sufficient substitute for mail notification. Indeed, in *Robinson v. Hanrahan, supra,* the Court held that even mail notice under the circumstances did not meet the constitutional test of notice reasonably calculated to apprise interested parties of the pendency of proceedings.

The position adopted in *Yeskel* has been undercut even more dramatically by the application of the general principles in *Mullane* specifically to *in rem* procedures.

For instance in *Covey v. Somers, supra,* the Court held that an incompetent landowner who received only mail notification of an impending foreclosure of tax delinquent premises was denied due process. In requiring special protection for the taxpayer in that case, the Court reiterated the general rule:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. Mullane v. Central Hanover Bank & Trust Co., 229 US 205, 213, 214, 93 L ed 865, 873, 874, 70 S Ct 652.
>
> [351 *U. S.* at 146; 100 *L. Ed.* at 1026]

In *Nelson v. New York,* 352 *U. S.* 103, 77 *S. Ct.* 195, 1 *L. Ed.* 2d 171 (1956), the Court held that a landowner was not deprived of due process where mail notification of a foreclosure was sent, but misplaced by the taxpayer's bookkeeper. However, its holding clearly indicated that *Mullane* was applicable to the type of foreclosure statute involved in that case:

> We conclude, therefore, that the City having taken steps to notify appellants of the arrearages and the foreclosure proceedings and their agents having received such notices, its application of the statute did not deprive appellants of procedural due process.
>
> [352 *U. S.* at 108; 1 *L. Ed.* 2d at 175]

Elsewhere in the opinion the Court reaffirmed the conclusion that due process requirements apply to foreclosure proceedings:

> We hold that nothing in the Federal Constitution prevents [foreclosure] where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.
>
> [352 *U. S.* at 10; 1 *L. Ed.* 2d at 176]

Equally important, we cannot accept the *Yeskel* court's apparent conclusion that the efficient operation of the municipality's tax system outweighs any constitutional claims to notice and an opportunity to be heard prior to foreclosure. While the importance of the government's taxing power cannot be ignored, we must not forget that governmental concern for convenience or simplicity does not outweigh individual rights. This was made clear by the United States Supreme Court in *Marchetti v. United States,* 390 *U. S.* 39, 88 *S. Ct.* 697, 19 *L. Ed.* 2d 889 (1968) when it stated:

> The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers.
>
> [390 *U. S.* at 58; 19 *L. Ed.* 2d at 903.] [6a]

6a. In *Marchetti v. United States, supra,* and the companion case of *Grosso v. United States,* 290 *U. S.* 62, 88 *S. Ct.* 709, 19 *L. Ed.* 2d 906 (1968), the Court held that federal wagering tax statutes unconstitutionally infringed upon a taxpayer's Fifth Amendment privilege against self-incrimination. In *Efrain T. Suarez,* 58 *T. C.* 792 (1972), subsequent proceedings 61 *T. C.* 841 (1974), the Tax Court also rejected the notion that tax considerations outweighed constitutional protections. Applying Fourth Amendment guaran-

In fact, abuses of the tax power, more than any other factor, led to the adoption of constitutional guarantees to protect against future government excesses.[7] *See, G. M. Leasing Corp. v. U. S.,* 45 *U. S. L. W.* 4098, 4103 (U. S. Jan. 12, 1977), (noting that "one of the primary evils intended to be eliminated by the Fourth Amendment was the massive intrusion on privacy undertaken in the collection of taxes pursuant to general warrants and units of assistance.")

3.

There should be little doubt that under the *Mullane* test notice by publication is insufficient in a tax foreclosure proceeding where a landowner's name and address are at hand. Although *Yeskel* emphasized dicta in *Mullane* which might be read as supporting notice by publication, that language refers only to a situation in which publication is used in conjunction with other steps which are likely to

6a. (Cont'd.)

tees to federal tax jeopardy assessment procedures, the court concluded

> that any competing consideration based upon the need for effective enforcement of civil tax liabilities . . . must give way to the higher goal of protection of the individual and the necessity for preserving confidence in, rather than contempt for, the processes of Government.
>
> [58 *T. C.* at 805.]

7. Surely, the importance of the individual's property interest, even when measured against the Government's need to collect taxes, is reflected in Pitt's famous denunciation of the English "Cyder Tax":

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—all his force dares not cross the threshold of the ruined tenement!
>
> [15 Hansard, *Parliamentary History of England (1753-1765),* cited in *Frank v. Maryland,* 359 *U. S.* 360, 378, — *S. Ct.* —, 3 *L. Ed.* 2d 877, 889 (1959).]

notify a landowner that he is about to be deprived of his property. The Court in *Mullane* stated:

> Nor is publication here *reinforced by steps likely to attract the parties' attention* to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action which *in itself* may reasonably be expected to convey a warning. ° ° ° Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of the law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an *additional measure* of notification.
>
> [339 *U. S.* at 316; 94 *L. Ed.* at 874; emphasis added.]

The Court clearly noted its rejection of publication unaccompanied by any other notice:

> Publication may theoretically be available for all the world to see, but it is too much to suppose that [a person] does or could examine all that is published to see if something may be tucked away in it that affects his property interests.
>
> [339 *U. S.* at 320; 94 *L. Ed.* at 876.]

Although the Supreme Court has stated that there is no mechanical rule for determining "what process is due," *see Schroeder v. New York, supra*, 371 *U. S.* at 212; 9 *L. Ed.* 2d at 259; *Walker v. Hutchinson, supra*, 352 *U. S.* at 116, 1 *L. Ed.* 2d at 182, it has repeatedly found that notice by publication is insufficient where the name and addresses of persons to receive such notice are known. In *Schroeder*, the Court repeated the criticism of notice by publication which it had stated in *Mullane*:

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. 339 *U. S.* at 315.
>
> [371 *U. S.* at 212; 9 *L. Ed.* 2d at 259]

The same theme is also repeated elsewhere in the opinion in the form of a rule:

> The general rule that emerges from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known. . . .
>
> [*Id.* at 212-213; 9 *L. Ed.* at 259]

Other opinions reinforce this conclusion. *See Walker v. Hutchinson, supra*, 352 *U. S.* at 116, 117; 1 *L. Ed.* 2d at 182, 183 ("It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property ° ° ° In too many instances notice by publication is no notice at all."); *New York v. New York, N. H. & H. R. Co., supra*, 344 *U. S.* at 296; 97 *L. Ed.* at 336 ("Notice by publication is a poor and sometimes a hopeless substitute for actual service by notice. Its justification is difficult at best.")

Given the Court's repeated statements that due process demands nothing less than notice which is reasonably calculated to inform any interested party, it is clear that news-

paper publication would suffice only where it is not reasonably possible or practicable to give more adequate notice. Numerous courts have so held. *See, e.g., Ricker v. United States*, 417 *F. Supp.* 133 (N. D. Me. 1976); *Scoggin v. Schrunk*, 344 *F. Supp.* 463 (D. Ore. 1971), rev. on other grounds, 522 *F.* 2d 436 (9 Cir. 1975) *cert.* den. 423 *U. S.* 1066 (1976); *Laz v. Southwestern Land Co.*, 97 *Ariz.* 69, 397 *P.* 2d 52 (en banc 1964); *Olsen v. Goss*, 26 *Ariz. App.* 172, 547 *P.* 2d 24 (Ct. App. 1976); *Johnson v. Mock*, 19 *Ariz. App.* 283, 506 *P.* 2d 1068 (Ct. App. 1973); *Bd. of Sedgwick County Commissioners v. Fugate*, 210 *Kan.* 185, 499 *P.* 2d 1101 (1972); *Pierce v. Bd. of County Comm'rs of Leavenworth Co.*, 200 *Kan.* 74, 434 *P.* 2d 858 (1967); *Dow v. State*, 396 *Mich.* 192, 240 *N. W.* 2d 450 (1976); Note, "The Constitutionality of Notice by Publication in Process in Tax Sales in New York: The Insufficiency of Notice by Publication," 25 *Syr. L. Rev.* 769 (1974); Note, "Requirements of Notice in In Rem Proceedings," 70 *Harv. L. Rev.* 1257, 1267-68 (1957); Note, 5 *Rutgers L. Rev.* 425 (1950). *Cf., Balthazar v. Mari Ltd.*, 201 *F. Supp.* 103 (N. D. Ill. 1969), aff'd p. c. 396 *U. S.* 114, 90 *S. Ct.* 397, 24 *L. Ed.* 2d 307 (1969); *Fisher v. Muller*, 53 *Mich. App.* 110, 218 *N. W.* 2d 821 (Ct. App. 1974) (failure to give mail notice of tax increase barred subsequent tax lien and sale); *Meadowbrook Manor, Inc. v. St. Louis Park*, 104 *N. W.* 2d 540 (Minn. 1960) (notice by publication insufficient in special assessment). *But see, McMaster v. Santa Rosa*, 27 *Cal. App.* 3d 958, 103 *Cal. Rptr.* 749 (Ct. App. 1972); *Botens v. Aronauer, supra; Cascade Tree Farms, Inc. v. Clackamas County*, 42 *P.* 2d 606 (Ore. en banc 1968); *Umatilla County v. Porter*, 12 *Or. App.* 393, 507 *P.* 2d 406 (Ct. App. 1973); *Marlowe v. Kingdom Hall of Jehovah's Witnesses*, 541 *S. W.* 2d 121 (Sup. Ct. Tenn. 1976).

4.

We also believe that the notice requirement of the statute are violative of due process under our State Constitution. While we have not yet specifically addressed ourselves to the problem of notice under Art. 1, par. 1, we have at various times interpreted the state provision to substantially encompass rights guaranteed under the Federal Constitution, *see Penn.-Reading S. S. Lines v. Bd. of Pub. Utility Comm'rs*, 5 *N. J.* 114-26 (1950), *cert.* den. 340 *U. S.* 876, 71 *S. Ct.* 122, 95 *L. Ed.* 637 (1950); *Washington Nat'l Ins. Co. v. Bd. of Review*, 1 *N. J.* 545 (1949), including the right to a hearing where governmental action affects an individual's property interests. *See Cunningham v. Dept. of Civil Service*, 69 *N. J.* 13, 19 (1975); *McFeely v. Bd. of Pension Comm'rs*, 1 *N. J.* 212, 216 (1948). Our interpretation of the State Constitution need not rest on the Supreme Court's interpretations of similar provisions. In fact, we have at times interpreted our State Constitution to provide greater protections than those existing under analogous Federal provisions. *See, State v. Johnson*, 68 *N. J.* 349 (1975); *Robinson v. Cahill*, 62 *N. J.* 473, 490 (1973) (dictum), *cert.* den. sub nom, *Dickey v. Robinson*, 414 *U. S.* 976, — *Sup. Ct.* —, — *L. Ed.* 2d — (1973); *So. Burlington Cty. NAACP v. Tp. of Mt. Laurel*, 67 *N. J.* 151 (1975), *cert.* den. and appeal dism'd, 423 *U. S.* 803, 96 *S. Ct.* 18, 46 *L. Ed.* 2d 28 (1975); *King v. So. Jersey Nat. Bank*, 66 *N. J.* 161, 180 *et seq.* (Pashman, J., dissenting). Nevertheless, we are satisfied that under the facts of this case, the interpretation given the Due Process Clause by the United States Supreme Court under *Mullane* and *Covey* offers a sound basis for interpreting our similar state provision. *Cf., State Bd. of Milk Control v. Newark Milk Co.*, 118 *N. J. Eq.* 504, 418 (E. & A. 1935). Accordingly, we hold that Art. I, par. 1 of our State Con-

stitution provides an independent ground for our decision today.

III

The minimal effort necessary to provide due process undercuts any argument of governmental necessity which might be raised in justification of the statute. *See Schroeder v. New York, supra,* 371 *U. S.* at 214, 9 *L. Ed.* 2d at 260 (Notice is "an obligation which the mailing of a single letter would have discharged"); *Dow v. State,* 46 *Mich. App.* 101, 207 *N. W.* 2d 441, 447 (1973) (Gillis, J., dissenting), rev'd *Dow v. State, supra* ("All such a holding would require is the use of a postage stamp"). The burden imposed by this duty hardly outweighs an individual's interest in retaining possession of a home which may have been purchased with a lifetime's worth of earnings, or property necessary to sustain a family's income. In the instant case the owner will lose property valued at $306,000 to satisfy a tax lien totalling $79,029.17. *See also, Scoggin v. Schrunk, supra* (land worth $10,000 sold for unpaid street assessment of only $209.37); *Wager v. Lind, supra* (home worth $15,000 sold for $174.37 in back taxes). As Justice Oliphant concluded, dissenting in *Yeskel*:

> [T]o divest ownership without personal notice and without direct compensation out of the excess value is the instance where constitutional government approaches most nearly to an unrestrained tyranny. Redemption is the last chance of a citizen to recover his property.
>
> [5 *N. J.* at 339.]

Consequently, we hold under both state and federal constitutional guarantees, that where an owner's name

and address appear on the municipality's tax rolls, notice *must* be sent by mail before a taxpayer's right to redeem his property may be foreclosed.[8] In order to avoid upsetting settled titles based on foreclosure proceedings, we grant the requested relief to the landowner in this case, but hold that our decision should be applied prospectively only. *See State v. Nash,* 64 *N. J.* 464 (1974); Note, *supra,* 84 *Yale L. J.* at 1517; Note, "Notice by Publication: Walker v. City of Hutchinson," 24 *U. of Chicago L. Rev.* 553, 560 (1975). Accordingly, where a complaint is filed against an owner in a foreclosure proceeding after the date of this decision, or is presently pending, the municipality must mail notice to him before his right of redemption may be barred. We also note that an affidavit of compliance with this requirement should be filed by the municipality in the foreclosure proceeding. This procedure would remove any title objection arising from this opinion.

The lower court's denial of the motion to reopen the final *in rem* foreclosure proceeding is reversed.

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8. Although not constitutionally impelled in this regard, we concur that registered or certified mail, return receipt requested, should be utilized to notify a landowner of the foreclosure proceeding. If the letter is refused, or simply not accepted, notice by ordinary mail should be sent to that address and to the clerk of the court. This result comports with various Court Rules which concurrently deal with notice requirements. *R.* 1:5-2; 4:4-4(a); 4:4-5.

Since the present rule governing foreclosures, *R.* 4:64-7 fails to make notice by mail mandatory in foreclosure proceedings, we are submitting this matter to the New Jersey Supreme Court Committee on Civil Practice to revise the rule in accordance with this opinion and submit its proposal to us for formal adoption.

APPENDIX E.

SUPREME COURT OF NEW JERSEY

A-33 September Term 1976

TOWNSHIP OF MONTVILLE, a Municipal Corporation in the County of Morris and State of New Jersey,
Plaintiff-Respondent,

v.

BLOCK 69, LOT 10, assessed to Anton Spitz and Ida Spitz,

BLOCK 56, LOT 16, assessed to John H. Hixson,

BLOCK 98, LOT 12, assessed to Wayne P. and Sue Ann Van Duyne,
Defendants,

and

BLOCK 39, LOTS 1, 75B, 75C, 90, 91 and 92, assessed to MONTVILLE INDUSTRIAL PARK, INC.,
Defendant-Appellant.

CONFORD, *P. J. A. D.* (temporarily assigned), dissenting.

The Court today overrules *City of Newark v. Yeskel*, 5 *N. J.* 313 (1950), and holds the notice provisions of the In Rem Tax Foreclosure Act (1948), *N. J. S. A.* 54:5-104.29 *et seq.*, to be invalid as a deprivation of due process to the owner of the property foreclosed. I dissent because I believe *Yeskel* was correctly decided; that the In Rem procedures serve an extremely important public interest; and that property owners are not visited with any essential injustice by the operation of the statute. Finally, as will be

noted in detail, the United States Supreme Court has on several recent occasions deliberately eschewed ready opportunities to make the kind of due process holding in a tax foreclosure case which this Court announces today. I would refrain from such a holding until and unless compelled to do so by the Supreme Court.

Although not material to the strictly legal issues before us, I believe it warrants mention that upholding the statutory procedure in the present case would not work any injustice on the instant appellant as it was repeatedly warned that its properties were being, or about to be, foreclosed for tax arrearages, and did nothing about it until after the foreclosures were an adjudicated finality.

I.

The basic contention projected by defendant's appeal is that where the municipal officials concerned know the taxpayer's name and address notice of the actual filing of the tax foreclosure proceeding must be sent to the taxpayer at that address as a minimal requirement of federal constitutional due process. The seminal modern case theoretically supportive of the view that due process requires actual rather than constructive notice of any proceeding in which final adjudication of a person's rights or interests is to take place is *Mullane v. Central Hanover B. & T. Co.*, 339 *U. S.* 306 (1950). It was there held that notice by publication to beneficiaries of a statutory common trust fund of an application by the trustee for approval of its account, as provided for by a New York statute, did not meet minimal requirements of due process. The court there broadly stated (*Id.* at 314):

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Notice by publication was held not to meet that standard. *Mullane* has been a major foundation stone in the more recent application of the principle stated, directly or indirectly, to a wide variety of settings by the Supreme Court. See, *e.g., Walker v. Hutchinson*, 352 *U. S.* 112, 115-116 (1956) (condemnation); *New York v. New York, N. H. & H. R. Co.*, 344 *U. S.* 293, 296 (1953) (bankruptcy); *Schroeder v. New York*, 371 *U. S.* 208 (1962) (condemnation); *North Georgia Finishing v. Di-Chem*, 419 *U. S.* 601 (1975) (garnishment); *Covey v. Town of Somers*, 351 *U. S.* 141, 146 (1956) (tax foreclosure as against incompetent owner). The controlling effect of the *Mullane* doctrine, as a matter of general principle, cannot of course be gainsaid. The critical question for our resolution is whether municipal tax foreclosure proceedings, upon which the Supreme Court has not yet squarely ruled in this regard, constitute a legitimate exception to the *Mullane* principle for reasons of public policy, reasonableness and fair imputation of notice to those affected.

Mullane had been recently decided when this court first passed upon and sustained the constitutionality of the *in rem* statutory notice provisions in *City of Newark v. Yeskel, supra*. The court distinguished *Mullane* as follows (5 *N. J.* at 321-322):

> ° ° ° The difference between a proceeding for the settlement of a trust account by a banking institution and a proceeding by a political subdivision of the state to enforce the payment of taxes which have been regularly assessed and levied is patent. The court, in the *Mullane* case, in discussing the rights of owners of tangible property within a state to notice of proceedings affecting such property, said:
>
> " ° ° ° When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing. *Cf. Anderson National Bank v. Luckett*, 321 *U. S.* 233; *Security Savings Bank v. California*, 263, *U. S.* 282; or that he has left some caretaker under a duty to let him know that it is being jeopardized. *Ballard v. Hunter*, 204 *U. S.* 241; *Huling v. Kawy Valley R. Co.*, 130 *U. S.* 559. As phrased long ago by Chief Justice Marshall in *The Mary* 9 *Cranch*, 126, 144, 'It is the part of common prudence for all those who have any interest in (a thing) to guard that interest by persons who are in a situation to protect it.' "

The essential rationale of *Yeskel* can be paraphrased by saying that realty taxes are the lifeblood of municipal government; that their ready collection and an effective and inexpensive means for enforcement of the public lien therefor are peculiarly vital to the public welfare; and that these facts support the justice of the concept that all who have an interest in a parcel of realty, knowing that taxation thereof is certain and the enforcement of the public lien therefor mandatory and inexorable, must either see to the payment of taxes when due or place themselves on continuous notice and inquiry of the steps taken in the enforcement of the public lien through the ultimate pro-

ceedings for foreclosure of the right of redemption. See 5 *N. J.* at 318-319. *Cf. Bron v. Weintraub,* 42 *N. J.* 87, 91-92 (1964). Those cases in the United States Supreme Court which have heretofore expressly addressed the question have consistently upheld the stated philosophy, although sometimes by assumptions which may not independently withstand critical analysis.[1] See *Huling v. Kaw Valley Railway and Improvement Co.,* 130 *U. S.* 559 (1889); *Winona & St. Peter Land Co. v. Minnesota,* 159 *U. S.* 526 (1895); *Leigh v. Green,* 193 *U. S.* 79 (1904); *Ballard v. Hunter,* 204 *U. S.* 241 (1907); *Longyear v. Toolan,* 209 *U. S.* 414 (1908); *North Laramie Land Co. v. Hoffman,* 268 *U. S.* 276 (1925).

The history of statutory procedures in this State for realization upon municipal tax liens prior to the adoption in 1948 of the In Rem Tax Foreclosure Act lends point to the public-policy underpinning of the rationale for dispensation of personal notice to parties in interest discussed above. There were two methods of perfection of a tax title after the tax sale: (a) by notice to redeem; (b) by bill in Chancery to bar the equity of redemption. In neither case could the right to redeem be barred in less than two years from the date of the tax sale. *N. J. S. A.* 54:5-77; *N. J. S. A.* 54:5-86. Since the notice to redeem had to be gievn to "all persons interested in the land", *N. J. S. A.* 54:5-77, it entailed the expense of a full title search. Title examinations in the 1940's could cost upward of $100 plus an attorney's fee. Moreover, that method was unavailable against infants and incompetents so long

1. For example, that a proceeding to enforce a lien against land, being *in rem* and not against the owner *in personam,* thereby somehow does not affect his property interests so as to call for the same kind of notice. Compare 5 *N. J.* at 323-325 with *Mullane v. Central Hanover B. & T. Co., supra* (339 *U. S.* at 311-313) and Note, "Requirements of Notice in In Rem Proceedings", 70 *Harv. L. Rev.* 1257, 1263-1264 (1957).

as the impediment continued. *N. J. S. A.* 54:5-84. It was thought that lack of judicial supervision of the procedure cast some doubt on its efficacy to establish good title. See *First Report* of the Commission on State Tax Policy (1946) p. 45 ("Commission Report" hereinafter).

Foreclosure by bill also entailed a full search of the title and incidental expenses and costs of the chancery proceeding itself. This could run a total expense of $400 plus attorneys fees in a matter complicated by the presence of numerous parties in interest even though the land involved was vacant and of an assessed value of only $1,100. Albano, " 'In Rem'—Memorandum on Advisability of Such Proceedings in New Jersey", 1947 *New Jersey Municipalities* p. 25.[2]

Adding to the difficulties of converting tax liens into municipal cash was the former traditional hostility of the courts to tax title purchasers *vis a vis* claimants for redemption. See *Wittes v. Repko,* 105 *N. J. Eq.* 241 (Ch. 1929), aff'd 107 *N. J. Eq.* 132 (E. & A. 1930); *Bonded Certificate Corp. v. Wildey,* 137 *N. J. Eq.* 564 (E. & A. 1946). This, in turn, fostered reluctance of title companies to insure tax titles, thereby impairing their salability by municipalities and reducing the proceeds to be realized from such sales. See Note, "Tax Sale Law in New Jersey: A Re-Examination", 26 *Rutgers L. Rev.* 266, 276 (1973).

The movement toward adoption of the In Rem Tax Foreclosure Act was also promoted by the fact that the conditions described above led to delay by municipalities in instituting foreclosures on so-called "deadwood" tax

2. A fuller exposition by the same authority, an expert in municipal tax lien law, of how title problems could threaten the marketability of a title derived through a conventional bill to foreclose is set forth in Albano, "Due Process And Its Application To Tax Lien Foreclosures", 5 *Rutgers L. Rev.* 474, 481-482 (1951).

liens; this, in turn, resulted in such property continuing as a tax ratable for which, although unproductive, the municipality was charged county and state taxes. *Commission Report, supra,* at 42.

The first *in rem* tax foreclosure act adopted in New Jersey was *L.* 1947, *c.* 333. This act was immediately felt to be unsatisfactory. See the statement accompanying the bill which as enacted became *L.* 1948, *c.* 96, the present *in rem* statute. The 1947 act required not only publication and posting of the notice of foreclosure but also its mailing to the "last known address of each last known owner" of the property as the same appeared in the county and municipal tax record, but the statute stated that "the failure of any person to receive such notice by mail should not affect the validity of any proceedings brought pursuant to this act". *C.* 333, sec. 15. However, by section 14 it was provided that if any person claiming an interest in or lien upon the property requested in writing that the tax collector send him notice of institution of aproceeding the notice was to be sent to the person at the address specified within 15 days after institution of the proceeding, and no final judgment could be entered without the filing of proof of such mailing. There was no saving clause as to validity in event of failure of such mailing, as there was in section 15.

Objection to the section 14 mandatory notice requirement appears to have been one of the principal reasons for the dissatisfaction with the 1947 act which led to its supercession by the 1948 act. According to a letter dated December 22, 1975 by George H. Bohlinger, jr., New Jersey Revisor of Statutes, who was active in the drafting of the bill which became *L.* 1948, *c.* 96 on behalf of the New Jersey Institute of Municipal Attorneys, a sponsor of the legislation, leading title companies indicated they

would not insure titles based upon foreclosures under the 1947 act. As there stated:

> ° ° ° A point was made that the tax collector's office was not such office of public record where the demands for notice and the proof of service of notice could be safely and permanently kept. Additionally, it was felt that in many municipalities the tax collector's office was not and could not be adapted to an office of public record. Some tax collector's offices in small municipalities were then situated at the home of the tax collector. Some still may be.

Thus, the letter went on, it was possible that in some cases the notice might be given but the record of it lost or destroyed.[3]

This court has summarized the reasons for the need of an *in rem* act which resulted in the 1948 statute as being "to reduce the excessive costs of foreclosing tax delinquent property and the desirability in rendering a marketable title to the purchaser ° ° °". *Teaneck Tp. v. Block 427, Lots 9-10,* 19 *N. J.* 386, 397 (1955).

The general provisions of the In Rem Tax Forclosure Act (1948) are fully described in the *Yeskel* case. 5 *N. J.* at 323-325. The only mandatory notice requirements are for posting and publication. A significant subsequent amendment as of the time of institution of the instant petition for foreclosure in 1973 was the following. Whereas previously the action could not be instituted unless "for the four calendar years next preceding the commencement of

3. If one responded to the stated objection that the section 14 additional requirement of filing in court of proof of the mailing of the notice constituted an assurance against loss or destruction of the proof, the response might be that an affidavit of non-demand by any parties in interest other than those to whom notice was mailed might be regarded as unsatisfactory proof of such non-demand by a title insurer.

the action, no part of any general land taxes levied and assessed against the land covered by such certificate [had] been paid", *N. J. S. A.* 54:5-104.34, the condition was reworded by *L.* 1968, *c.* 464 to read: "Unless ° ° ° [a]ll or any portion of the general land taxes levied and assessed against the land for 48[4] months next preceding the commencement of the action ° ° ° remains unpaid". Realty taxes are assessed annually, *N. J. S. A.* 54:4-1, but are payable quarterly on the first days of February, May, August and November of the current tax year, after which, if not paid, they are delinquent and become subject to stated penalties and interest. *N. J. S. A.* 54:4-66. It is thus apparent that as of the time of institution of the instant foreclosure delinquent property was safe from institution of foreclosure proceedings unless part or all of the quarterly payment tax obligation due for *each* of the sixteen quarters preceding such institution remained unpaid. This was patently a strong safeguard against sudden or precipitate forfeiture of an owner's property for tax default. In the present case, for instance, some of the delinquencies dated back to 1966, all at least to 1967, and the foreclosure was not instituted until May 8, 1973 nor final judgment entered until August 1, 1973.

Notwithstanding the decision in *Mullane* and the broadening concepts of due process expressed by the United States Supreme Court subsequent thereto in the cases cited above and others relied upon by defendant, only a few state courts have repudiated the previous consensual view that due process does not require personal service or mailing of notice of tax foreclosure proceedings. See, *e.g.*, *Board of Sedgwick County Com'rs. v. Fugate*, 210 *Kan.* 185, 499 *P.* 2d 1101 (Sup. Ct. 1972); *Laz v. Southwestern Land Co.*, 97 *Ariz.* 69, 397 *P.* 2d 52 (Sup. Ct.

4. The figure "48" was changed to "21" by amendment in *L.* 1974, *c.* 91, sec. 5.

1964); *Dow v. State*, 396 *Mich.* 192, 240 *N. W.* 2d 450 (Sup. Ct. 1976), all proscribing notice by publication where the name and address of the landowner are known or readily obtainable. Also so holding is *Scoggin v. Schrunk*, 344 *F. Supp.* 463 (D. Ore. 1971) rev'd on other grounds, 522 *F.* 2d 436 (9th Cir. 1975) *cert.* den. 423 *U. S.* 1066 (1976). In accord, see Note, "The Constitutionality of Notice by Publication in Tax Sale Proceedings", 84 *Yale L. J.* 1505 (1975).

Recent decisions adhering to the majority view on the issue are *Botens v. Aronauer*, 32 *N. Y.* 2d 243, 344 *N. Y. S.* 2d 892, 298 *N. E.* 2d 73 (Ct. App. 1973), app. dism. 414 *U. S.* 1059 (1973); *Christie-Stewart, Inc. v. Paschall*, 502 *P.* 2d 1265 (Okl. Sup. Ct. 1972), vacated and remanded, 414 *U. S.* 100 (1973); *Umatilla County v. Porter*, 12 *Or. App.* 393, 507 *P.* 2d 406 (Ct. App. 1973). In *Botens, supra*, the court distinguished the *Mullane* line of authority by saying that in those cases "the individuals had no reason to expect that their property interests were being affected. Such is not the situation in the case before us." 344 *N. Y. S.* 2d at 896.

The attitude of the United States Supreme Court on the subject as of this writing is uncertain. In *Covey v. Town of Somers, supra* (351 *U. S.* 141) a tax foreclosure was held invalid, although notice was mailed to the taxpayer, because the municipal authorities knew the taxpayer was incompetent. The implication was that the town should have seen to the appointment of a guardian. Citing *Mullane, supra*, the court found a denial of due process, but its discussion does not allude to the earlier cases of the court upholding tax foreclosures lacking direct notice to the owner. In *Nelson v. New York*, 352 *U. S.* 103 (1956), the court affirmed the determination of the New York state courts that due process was satisfied by the mailing of notice to the trustee of the owner-estate notwith-

standing that the agent of the trustee had neglected the matter and that the property foreclosed was sold for a much larger sum than the taxes in default, the city retaining the excess proceeds. Again, there was no allusion to the substantial body of law treating tax lien foreclosures as a *casus sui generis* for due process purposes.

A conscious effort by the Supreme Court to avoid facing the issue appears to have occurred in the *Christie-Stewart, Inc.* case, *supra*, where the Oklahoma Supreme Court sustained the validity of the notice-by-publication provisions of its tax sale act. The United States Supreme Court vacated the judgment and remanded for a determination by the Oklahoma court as to whether the appellant was bound on the non-constitutional state ground of statute of limitations. 414 *U. S.* 100 (1973), reh. den. 414 *U. S.* 1138 (1974). An appeal to the Supreme Court from the decision of the New York court in *Botens v. Aronauer*, *supra*, also upholding the due process aspect of notice by publication in respect of tax sale proceedings, was dismissed "for want of a substantial federal question". 414 *U. S.* 1059 (1973). As the Court of Appeals had noted in its opinion that it was "conceded that plaintiffs [owners] had not actually received the notice of redemption ° ° °" although "there was evidence to indicate the county treasurer had mailed such a notice ° ° °", 344 *N. Y. S.* 2d at 894, the action of the Supreme Court in dismissing the appeal may be regarded as ambivalent. See Note, 84 *Yale L. J., op. cit. supra*, at 1510-1511.

The most recent instance of avoidance of the issue by the Supreme Court is *Pearson v. W. P. Dodd*, 50 *L. Ed.* 2d 574 (Jan. 12, 1977). The court there had before it a two-stage procedure for liquidation of a tax lien under the West Virginia laws. In the first stage the tax delinquent interest is transferable by sale to the state by a notice procedure involving only public posting and publication. Redemption can be had within 18 months of the sale. In the second stage the state files an action authorizing sale to a third person and obtains an order therefor. Notice of such action is only by publication. Under state law, absolute title vests in the state 18 months after the first sale, subject only to a discretionary power in the court to permit redemption on petition therefor prior to confirmation of the second sale. *Pearson v. Dodd*, 221 *S. E.* 2d 171, 183 (Sup. Ct. App. W. Va. 1975). This second possibility of redemption is considered "a matter of pure legislative prerogative", or "grace", *ibid.*, and was held by the West Virginia court not the foundation for a right of attack upon the notice provisions preceding the second sale on due-process grounds. The United States Supreme Court, after first noting probable jurisdiction, 49 *L. Ed.* 2d 1182 (1976), dismissed the appeal after oral argument "for want of a properly presented federal question". 50 *L. Ed.* 2d 574. It held that since the appellant was not questioning the validity of the first sale but only the second, and since the state had obtained "absolute title" 18 months after the first sale, appellant had no "constitutionally protected property interest" upon which she might challenge the notice provisions attendant upon the second sale. *Ibid.*

On the foregoing showing of the facts and the law, I am not convinced that our *in rem* statute should now be held lacking in due process, contrary to the express holding of validity arrived at by this court in *City of Newark v. Yeskel, supra.* I begin with the ever-present presumption of the constitutionality of legislation, here fortified by a thoroughly considered prior determination by the court. I consider the conclusion reached in *Yeskel* a sound one, although not necessarily for all the reasons advanced by the court. I am persuaded of the reasonableness and fairness of the statute in respect of notice after balancing the

urgent need of municipalities for an inexpensive and expeditious means of liquidating tax liens and the practical remoteness of prejudice to property owners.

At no time since the great Depression have the fiscal necessities of government at all levels, and consequently the need for dependability of tax collections, been greater than at present. On the other hand, our laws give every fair consideration to realty taxpayers in difficulty. A tax sale is not held until after July 1 of the year following the year of a delinquency. *N. J. S. A.* 54:5-19. Copies of notices of sale are posted in five "most public places" and published once a week for four weeks preceding sale. *N. J. S. A.* 54:5-26. Notice of the sale is to be mailed to the owner at his address shown in the list, but not mandatorily. *N. J. S. A.* 54:5-27. Adjournments of sale can be had in the discretion of the collector but not for more than eight weeks, after which new publication and posting of sale must be had. *N. J. S. A.* 54:5-28. The municipality may by resolution allow the owner to pay delinquencies in monthly installments over a five-year period. *N. J. S. A.* 54:5-19. As noted above, where *in rem* foreclosure of the right of redemption by court proceedings is undertaken, they may not be begun unless each quarterly tax bill for all of the sixteen quarters preceding institution of the action remains unpaid either in whole or in part.[5] Thus, final action to forfeit the property is withheld for at least four years of continued delinquencies by the owner, and even then there may be redemption before entry of final judgment. While the statute does not command the mailing of notice to anyone in interest, it permits such mailing to any owner or lienor who previously requests it, *N. J. S. A.* 54:5-104.48, and the rules of court also contain such a non-mandatory direction for mailing to each person whose

5. But see note 4, *supra*.

name appears in the tax foreclosure list at his last known address. *R.* 4:64-7(c).

Having in mind what I regard as the universally known proposition that real estate taxes must be paid at the certain peril of eventual forfeiture of the property for delinquency therein, the latitude allowed owners under our statutes before properties can be foreclosed for delinquencies, the public need for free flow of tax revenues and the practical necessities underlying title insurance and the marketability of real estate, I regard the notice provisions of our *in rem* tax foreclosure statute as comporting with due process.

Even in relation to the vesting of ordinary *in personam* jurisdiction due process is not more exacting than procedures which do not offend "traditional notions of fair play and substantial justice". *International Shoe Co. v. Washington,* 326 *U. S.* 310, 316 (1945). In the instant tax-default context traditional notions of fair play and substantial justice should, I think, take into consideration a realty owner's duty to his fellow citizens to keep his property tax-current as well as the State's obligation of fair and just treatment of its taxpayers.

The considerations stated above suffice to render this category of proceeding *sui generis* and reasonably beyond the scope of the stricter notification requirements of due process held generally applicable by the United States Supreme Court.

In my view, the decision by the Court herein is, in principle, irreconcilable with the legislative objective of securing for municipalities the benefits of inexpensive tax foreclosures and ready marketability of titles emanating from such foreclosures. In terms of *due process,* when properly applicable, notice strictly should be given the holders of *all* significant interests in the real property, not just the last owner, as was recently held by the Michigan

Supreme Court in *Dow v. State, supra.* Application of such a rule, however, would render unavailable the benefits mentioned. But if, because of the considerations discussed above, and as I believe to be the case, tax foreclosures by municipalities are in a *sui generis* category wherein notice of tax foreclosure of tax delinquent property is reasonably imputable to all such holders of interests therein, the proceedings should be exempt from the mandatory necessity of affording actual notice to holders of *any* interest in the property, whether a free interest or less. What the Court is really doing here is imposing a policy judgment on the Legislature, not rendering a doctrinally viable holding as to constitutional law. While I might agree with that policy, *qua* policy, I would not impose it in the guise of due process.

II

Although the alleged notice deficiencies discussed in I hereinabove were the only grounds on which certification was sought in this case, the grant of certification brings up all the grounds of appeal advanced in the Appellate Division, this court not having otherwise ordered. *R.* 2:12-11. As to the other grounds of appeal and the adverse disposition thereof set forth in the opinion of the Appellate Division, I would affirm for the reasons there stated, which follow.

The procedural defects alleged are:

1) the complaint failed to set forth "the book and page or date and instrument number of the instrument by which" the taxpayer acquired title as mandated by *R.* 4:64-7(a); and

2) the notice of foreclosure failed to include the words "and serving" as mandated by *R.* 4:64-7(b)

which requires the notice of publication to notify landowners that they may defend by "filing and serving an answer to the complaint ° ° ° within 45 days after the date of publication of the notice."

Defendant concedes no prejudice resulted from these asserted departures from prescribed procedure but argues that strict compliance with the requirements of both the statute and the applicable rule is essential to confer jurisdiction on the court.

As to the first alleged defect, it is clear from an examination of the statute, *N. J. S. A.* 54:5-104.29 *et seq.*, and a consideration of the case of *Teaneck Tp. v. Block, 427, Lots 9-10,* 19 *N. J.* 386 (1955), that the purpose of filing the complaint is not to provide notice to the property owners of the pending action, which is accompanied by publication of the foreclosure list, but simply to invoke the doctrine of *lis pendens* against subsequent grantees. *Id.* at 396. *N. J. S. A.* 54:5-104.44.

With respect to the omission of the words "and serving" from the notice of foreclosure, we note that defendant did not file an answer.

Bearing in mind the legislative directive to give the act a liberal constitution as remedial legislation to encourage the barring of the right of redemption, *N. J. S. A.* 54:5-104.31 (see also *Teaneck Tp. v. Block 427, Lots 9-10, supra* at 397-398), we conclude that the two deficiencies noted do not affect the essential requirement for jurisdiction of the courts over the subject matter. That basic requirement is the manner in which the notice of the proceedings is given. *Borough of Paramus v. Ridgewood Park Estates,* 42 *N. J. Super.* 369, 374 (App. Div. 1956); *Lakewood Tp. v. Block 251, Parcel 34,* 48 *N. J. Super.* 581, 587 (App. Div.

1958); *Norwood v. Block 34, Lots 373*, 70 *N. J. Super.* 130 (Ch. Div. 1961); *cf. Preparatory Temple, etc. v. Seery*, 81 *N. J. Super.* 429 (Ch. Div. 1963).

Justice Mountain and Justice Clifford join in this opinion.

APPENDIX F.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2110-73

CITY OF ATLANTIC CITY,
a municipal corporation,
Plaintiff-Respondent,

v.

BLOCK C11, LOT 11,
Defendant-Appellant.

Argued October 21, 1975—Decided November 5, 1975.

Before Judges Kolovsky, Bischoff and Botter.

On appeal from Superior Court, Chancery Division, Atlantic County.

Mr. Stephen Hankin argued the cause for appellant.

Mr. Daniel J. Dowling, Assistant City Solicitor, argued the cause for respondent (Mr. Murray Fredericks, City Solicitor, attorney).

PER CURIAM.

This is an appeal from the denial of a motion to vacate a final judgment entered in an *in rem* tax foreclosure action. On January 8, 1973, the City of Atlantic City filed a complaint to foreclose certain tax sale cer-

tificates, including Certificate #9343 dated January 18, 1968. Synor Company was listed in the complaint as "transferee or purchaser of title" of the lands covered by that certificate. Final judgment of foreclosure was entered May 23, 1973. A motion to set aside this judgment as to the property of Synor Company based on affidavits of Rose Schoenthal was filed November 3, 1973, argued and denied. This appeal followed.

Appellant's affidavit asserted that Synor Company obtained title to the lands designated on the tax map of the City of Atlantic City as Block C11, Lot 11 on April 12, 1938. At that time Rose Schoenthal and Sylvan Schoenthal were husband and wife, and he was in full control of the Synor Company. Rose and Sylvan were divorced in 1953 (or 1960—it is not clear which is the correct date) and as part of the marital property settlement it was agreed that the property in question was to become the sole property of Rose. However, no deed or conveyance was ever executed conveying the property to Rose. She paid taxes on the property through 1965. A building erected on the property was operated as a hotel during the 1940s and 1950s, which building deteriorated and was ultimately demolished. The exact date of demolition is not furnished us but it appears to have been sometime in 1972. Taxes for the year 1966 were not paid and included with the 1967 tax bill was a notice of default in the 1966 taxes, together with notice of the possibility that the property would be sold for unpaid taxes. The property was sold to the city for unpaid taxes at a tax sale held September 19, 1967, and tax sale certificate #9343 was issued and duly recorded.

At the time the complaint in foreclosure was filed the delinquent taxes and interest totalled $52,579.57. After the complaint was filed notice was given pursuant to the

provisions of the *In Rem Foreclosure Act, N. J. S. A.* 54:5-104.29 *et seq.*, by publishing, posting and mailing to the Synor Company at the address shown on the last tax duplicate. A visual check for occupancy of the properties subject to the foreclosure action was made May 23, 1973, by the city and it disclosed that the building previously on the property in question had been demolished and the land was vacant.

Rose Schoenthal contends she first learned of the tax foreclosure proceedings approximately six months after the judgment was entered when a tenant operating a parking lot on the premises was notified September 24, 1973, by the city of the entry of the judgment. The tenant, in turn, notified Mrs. Schoenthal. The proceedings from which this appeal was taken followed.

Defendant first contends that the notice provisions of the In Rem Tax Foreclosure statute, as applied to the facts of this case, violate the due process clause of the Fourteenth Amendment of the United States Constitution. In support of this contention she argues that the notice provisions of the *In Rem* act are entirely inadequate and contrary to present-day concepts of due process. This argument was made to the Supreme Court in the case of *City of Newark v. Yeskel*, 5 *N. J.* 313 (1950), and rejected. The Court there held that the mandatory posting and publication requirements of the statute (*N. J. S. A.* 54:5-104.29 *et seq.*) satisfied due process requirements and that the act was constitutional. That case is binding on us and any change in its holding can only be made by the Supreme Court.[1]

1. See article *Constitutionality of Notice of Publication in Tax Sale Proceedings*, 84 *Y. L. J.* 1505 (1975), where the writer suggests that some *in rem* tax foreclosure statutes and the cases which held them valid may no longer be viable under present-day concepts of due process.

Appellant next contends that (1) her application to open the default judgment was made pursuant to *R.* 4:50 and it was an abuse of discretion for the trial court to deny her application and (2) the statutory limitation of three months within which an application to reopen a judgment in foreclosure under the statute (*N. J. S. A.* 54:5-104.67) must be made has been supplanted by *R.* 4:50. Appellant relies on the case of *New Shrewsbury v. Block 115, Lot 4*, 74 *N. J. Super.* 1 (App. Div. 1962), which we find not pertinent here.

In support of her application she contends that, while she was not the owner of record, the city had notice she was the actual owner of the property and was entitled to notice of the foreclosure action, because:

(A) In 1962 she made an application for reduction in the taxes on the property in her own name;

(B) The permit for demolition of the building and the demolition contract were in her name and not in the name of Synor Company;

(C) From 1960 to 1965 taxes on the property were paid from the personal account of Rose Schoenthal and not from Synor;

(D) In 1970 she visited the tax office and made a tender of $5,000 on account of the taxes then due, which tender was rejected;

(E) The personnel in the tax office, as a result of years of contact with her, knew her to be the owner of the property and knew where she lived;

(F) In 1960, 1962 and 1972, she made applications in her own name for a reduction in the assessment of the property and a reduction was granted; and

(G) The value of the property is $135,000, and it is inequitable to deprive her of the property for the taxes of $52,579.57.

The basic defect in appellant's argument is a total lack of proof of her standing to maintain this action, other than her unsupported statement that one of the terms of the marital property settlement was that she was to obtain title to the property. She concedes that the property was never conveyed to her but bases her claim on the assertion that all of the stock in Synor Company was to be given to her. This company is referred to as defunct, and she has never presented any documentation that she, in fact, possesses all of the stock in the company or has the right to act for it. She did not notify the tax collector of her name, address and interest in the property pursuant to *N. J. S. A.* 54:5-104.48 so that notice could be given to her.

There is nothing in the record to indicate that the city should have given notice to appellant of the institution of the foreclosure proceeding and her argument that, absent such notice to her, there was a lack of jurisdiction to enter the judgment of foreclosure, is without merit.

We see no abuse of discretion in the denial of the motion to reopen the judgment. Having reached this conclusion, it is unnecessary for us to express any opinion on the timeliness of appellant's application to open the judgment of foreclosure.

We also reject appellant's argument that tender of part payment in 1970 somehow tolled the statutory mandate of *N. J. S. A.* 54:5-104.34. That section of the statute provides that no action should be instituted to foreclose any tax sale certificate unless no part of any taxes levied and assessed against the land has been paid within four years. Appellant's attempt to equate a tender of part

payment, which was rejected, with a tax payment under the statute is not persuasive.

Appellant's final argument that the *In Rem* Foreclosure Act authorizes foreclosure only for taxes which have accrued on vacant lands is likewise without merit. See *City of Newark v. Block 86, Lot 30*, 94 *N. J. Super.* 468 (Ch. 1967).

Affirmed.

A True Copy

Elizabeth McLaughlin

Clerk

APPENDIX G.

SUPERIOR COURT OF NEW JERSEY
Appellate Division

Docket Number A 2110-73

CITY OF ATLANTIC CITY, in the County of Atlantic, a Municipal Corporation of the State of New Jersey
Plaintiff-Respondent,

v.

BLOCK C11, LOT 11,
Defendant-Appellant.

Motion

Schwehm Building
One South New York Avenue
Atlantic City, New Jersey
February 8, 1974

Before:

The Honorable George B. Francis, J. S. C.

Appearances:

Stephen Hankin, Esq.
Attorney for Defendant

Daniel J. Dowling, Esq.
Attorney for Plaintiff

INDEX.

MR. HANKIN: This is the return day on a Motion to set aside default judgment with respect to the act. I'll not go into a statement of the facts as they have been lengthy, as Your Honor indicated, on the constitutional argument which, I think, is stated as best as I can state in the brief itself.

There are several points I would like to touch upon, Your Honor, very, very briefly which are contained in the brief submitted to you sometime ago. I simply feel with respect to what this In Rem Foreclosure Act is supposed to mean and the intent of the legislature in enacting it never was meant to encompass the kind of situation, Your Honor, that we have in the present instance. I simply feel that the facts as elicited and the statement of facts concerning the filing of a notice of appeals on the tax review aspect of it in her name and all the other indicia that was indicated by the City of Atlantic City would make it so unquestionable and unequitable in this case not to open up this judgment so as to actualiy force the legislaturer's intention of this particular act. I feel that the authority which I cited for that is proper and I don't think that the decisions, the appellate decision defenses which have come down on the matter ever dealt with the kind of thing that's presented Your Honor in this matter. I feel, therefore, that aside from the statutory language of the In Rem Act of the specific provisions of it that the kind of situation presented here under the case

law that I've stated in Schrewsbury is sufficient regardless of the language in Schrewsbury and regardless of the language of the statute. I simply feel it would still, under the guidelines set forth in this brief, give Your Honor sufficient discretion to open this judgment up if Your Honor saw fit. I think Your Honor has the authority. The question is whether or not Your Honor will. It is a district issue, of course, but I think Your Honor has the authority on the basis of those cases to do it.

Now, basically, Your Honor, I would like to touch next on the issue of tender of payment because I feel that at a very minimum we are entitled to a plenary finding of fact here on this. The affidavits are in conflict. Mr. Dowling submitted the affidavit of Tom Burns which swears he never said that to Rose Schoenthal. Nevertheless, Rose Schoenthal, in her petition, in her affidavit, indicated this was absolutely true, was an absolute fact. We have submitted documentation to support her position with respect to the fact that on the day in question he was in there, in the Atlantic City Tax Office, and she paid her tax on another bill. We have submitted, I think, copies of that particular check on that particular date to indicate that she was, in fact, there. This creates a factual dispute which Your Honor should, under the guidelines of the case which I've cited here, and it would be, of course, Boroughshore Nurseries versus Block 115, Lot 4 and grant us a plenary hearing for the specific purpose of finding facts in relation to the fact in question and we ask for that and we pray for relief in that respect because we feel very frankly, a fact-finding hearing will clearly reveal that, in fact, the credibility of Rose Schoenthal outside the scope of the affidavit unquestionably not be contradicted. Last, but certainly not least, is the aspect which is very difficult for me to understand. The last argument that I made and

that is that the very court, without jurisdiction, subject matter jurisdiction in this point simply because the notice, the contents of notice of foreclosure were inadequate the decision of Yeskel which upheld the constitutionality of the In Rem Foreclosure Act in 1970. Even Yeskel indicated that the provision with respect to notice or aside from the provisions set forth in the statute the concept of notices even under Yeskel, of course, upheld the constitutionality of this statute minus two dissenting justices, of course, indicated that the most crucial part of this entire were the procedure aspects of it that went to the issue of notice. Now, it seems incredible to me in this particular case that Rose Schoenthal never received, in spite of the factual situation, any personal notice and it seems even more incredible because of the nature of this act the fact that the In Rem contract, that statute, of course, certainly don't admit the constitutionality of that provision. Constitutionally, she should have received notice under this particular proceeding.

Now, in this particular proceeding it seems incredible to me even in terms of the fact that this act is unreasonable, therefore, notices minimum statutorily in the notice of foreclosure she had not been given, at least, the very minimum same kind of notice that persons are given in this kind of suit. For instance, the notice never indicated where she should file her answer and notice in a summons of complaint. Now, of course, in this instance she didn't even receive statutorial notice—not to receive a summons and not even supposed to receive a copy of complaint. All that's required statutorily and the district could constitutionally and we contend that she is supposed to be noticed by way of the newspaper and we simply feel, Your Honor, with that minimum kind of notice required she ought to have the kind of notice that's required by

way of summons, by way of complaint with respect to that newspaper publication. We think it is very minimal and we think Yeskel, aside from the classic case of Marlin versus Central Hanover Bank and Trust Company, which, of course, as indicated in the brief is the classic decision on the issue of notice to date. We feel simply that that creates—if not constitutionally, Your Honor, in terms of subject matter. I truly feel it does the most equitable kind of situation that one could possibly conceive. We have a woman, Your Honor, who is a widow in this instance who has lost at least a hundred thousand dollars in equity of a piece of property because she was two months late in filing an answer to an In Rem Foreclosure complaint. We even found out that but for the fact her tenant, distinct from she herself was given actually personal notice. We feel this is unequitable and we feel that Atlantic City has been extremely unfair in the way it proceeded in this particular case and we ask for relief. Your Honor, we ask for a plenary hearing.

MR. DOWLING: We rest as does Mr. Hankin on our brief. Our primary technical objection is that Rose Schoenthal has no stand to bring this motion in the first place. There is nothing in any affidavit filed to show that she is either the owner of this property or that she ever indicated to anybody that she was the owner and in connection with her meeting with Mr. Burns in the Tax Office, there is nothing in her affidavit that says that she indicated that she was the owner of this particular property. She was in there paying taxes on another property which she owns at Atlantic City—I handled the tax appeal in the County Tax Court—and I have had no knowledge that she was the owner of the property. As you know from the copies of the petitions and the judgment, what not, that were filed, she made the affidavit as owner or agent and

it is customary if there is a corporation because somebody has to affirm it because the corporation itself cannot do it and as I said in my brief had there been no attorney I would then have inquired who the owner was. I didn't know who the owner was and I didn't until this motion was filed except as I had it on the records. Now, the reason I would have asked there be no attorney, the County Board invariably, if the corporation appears without an attorney, will either dismiss the case or set it down for a later date and advise whoever comes in but I cannot find a single word or inference in any of these papers that have been filed including the affidavit that says she is the owner.

Now, the fact is that this lady, or corporation itself, has not paid any taxes since 1966 and there is over fifty thousand of taxes due. It seems to me she is somewhat delinquent and on the occasion when she met with Mr. Burns in the Tax Office and unquestionably she did, he remembers it. He knew Mrs. Schoenthal. She came actually to pay the tax on the property she owns at Atlantic Avenue. She says, of course, that she tendered $5,000 on account of property now under review. He denied it but the point is that because we had a tax sales certificate he would not have the authority to take that money aside from the fact even had she, which, of course, he denies. Where there is a tax sales certificate if anyone comes in to pay on account then the tax clerk himself or the deputy tax clerk nor anybody has the right to pay. They were sent to the Director of Revenue and Finance, whoever he may be, to see if a plan could be worked out in accordance with the statute, that is, payment within three years in monthly installments. We don't necessarily say they have to be equal because it depends on what the circumstances are but Mr. Burns would have had no right to take that money even had it been offered and, of course, he denies that it was.

The other matter that Mr. Hankin mentioned deal with the notice. We feel that there is quite a bit of difference between a notice publication or notice to be posted and a summons. There is nothing in the statute that requires the items that he has mentioned. It tells them the property is being foreclosed and they have two courses. They can file, or they can redeem, or they can answer. If they answer, they must do so within forty-five days and, as I say in my brief, if they chose to act on their own they are obliged to find out what has to be done. If there is an attorney, of course, there's no problem, of course, he knows what to do but basically the problem is that we feel she has no standing here at all.

MR. HANKIN: I would note one thing. At several points in the affidavit she did indicate, in fact, and inform the City of Atlantic City of the fact that she was the owner of the property. She did, among other files, filing her petition and that's clearly stated in both the affidavits.

MR. DOWLING: That's true and that's alleged but saying so doesn't make it so.

THE COURT: The brief of Mr. Hankin deals, I think, with seven points and while the arguments did not cover them all I think it would be appropriate to at least comment on each one briefly.

There is a challenge to the constitutionality of this proceeding. Generally, I think, that all I can say about that is that I would be apprehensive to overrule or adopt the minority position in Newark versus Yeskel. The Court dealt with this statute very early in the game on the constitutionality, albeit, with some dissent and the argument on the constitutionality of the statute must fall because the findings of fact in Yeskel on this Court. Counsel then moves challenging the constitutionality of the statute of the In Rem Act to apply to reopen the judgment. Now,

that brings an apparent conflict, at least, the statutory limitation which limits any reopening in the judgment. The three months that's contained within the In Rem Act itself and the rule for fifty-one to the authority cited in Schrewsbury indicated that the rule making power—this is a matter of procedure making power override the statute but in determining what reasonable time is under the rule the legislative mandate in the statute as there is three months. Now, whether there is fraud, lack of jurisdiction, the statute itself and the rule indicate authority on the rule indicates whether there be independent action. There may be relief given to a party apparently beyond the grounds of fraud or lack of jurisdiction and that's where some equity is shown. I've been through this file and I haven't seen nor have I heard argued any equitable basis for extension of that rule. I think that under the rule and the ruling is that the defense to the statute that there has been no grounds shown why the time period should be extended and more than that in any reopening of judgment. There has to be shown, not only facts which go to excuse delay, but there has to be shown there is a defense and while that is in question on the balance of the point remaining here for the reasons that I'll state. I feel there is no defense. The rule falls of its own weight. The third point raised, I believe, was that the chain owner, last chain owner of title should have some notice rather than the record owner. Well, that's contrary to the procedure under the statute but it is argued so it be there was actual notice here. I can't think of a worse situation of the In Rem Act to be able to initiate it by simply saying any time a taxpayer or any time a chain owner makes some contact with some city employee, whether he rises to an official status or not, is going to then and there impute actual knowledge of the true owner of the property to the City, but that be the case I think that very often you

couldn't get a successful In Rem through that or lack of jurisdiction over the person and if you are going to say that a visit by a taxpayer to the Tax Office through the assessor or assistant assessor who indicates to that assessor that there is a corporate ownership that the true chain, true title is the individual that that is not binding on the City to take action. Now, again to put the mechanics of changing their records and they have a statement by somebody it shouldn't be the duty and should not fall on them to begin with. If it did, what authority would they have on the mere statement by an individual that she or he is the chain owner. It's not contemplated by the statute nor is the fact that one goes to the Tax Boards, County Tax Board, and seeks relief as indicated many times before Tax Board agents sometimes are not allowed, if they are representing corporations, sometimes there is a matter of practice that they are not permitted to say anything. If they require an attorney sometimes he speaks in some counties, but, in any event, the County Tax Board is a body existing on its own and they are in a vacuum, so to speak, isn't going to impute any actual knowledge to that city. There are thousands and thousands of parcels of real property in the City of Atlantic City and every time somebody says well, I'm the true owner. I think it is a very simple matter for the last chain owner to record the deed in which the process then automatically goes—the abstract is sent to the assessor and the matter automatically resulting in the chain owner to record the owner.

The defendant's fourth point here indicates that the offer to pay a partial payment of these taxes not only put him on notice for the reasons I've expressed but did not put them on notice as to the real owner but that the tender should have been honored and that should have been sufficient to take the matter out of the foreclosure. Well, as indicated by Mr. Dowling's brief that is the statutory

or installment on the delinquent tax, there isn't in affidavit submitted here, there is no, not the slightest indication anything was done here outside of an attempt of $5,000 on what it is stated to be a $50,000 tax obligation. Counsel states the case saying that this resolution called for by the statute is not really necessary in that it is a formality and is not really necessary citing forty-eight super–I forget the page number of that case but the resolution there had to do with the resolution of foreclosing tax and certificates and it was in challenge the In Rem Foreclosure on the basis of the challenge. If there was a resolution it doesn't appear in the proceedings, in the complaint, and the Court held that formality. In any event, the defendant couldn't take advantage of it. That's certainly not the situation here where the discretionary power of the resolution on taking installment payments and it's not a matter left to the tax collector. So, that it is not valid tender and if it were tender, one that was not accepted. It stated that the argument that the reduction given by the Tax Board itself was part payment. Under any analogy all it would be, it would be part payment if by resolution of the governing body were accepted as such under some installment scheme standing alone, it is not. I skip over five for a minute which has to do with the notices. Six, it is argued that the In Rem act only applies to vacate lands in ninety-four super four sixty-eight citing the statute itself, 54:1 or 4.30 by definition lands means real estate, all real estate. The Act is applicable to improved properties. It is argued in counsel's next point that the tax foreclosure notice was defective in that the process did not come up for plenary suit, that is to say, summons on complaint with the usual answer to be filed where it should be–when it should be filed and upon whom it should be served and so forth. Well, I would hold that while the history of the In Rem Act and the pro-

ced al history of the Act certainly not always guide what is p per. Many things are done for years until they come under challenge. I might add the In Rem Foreclosure has been done for some twenty-five or thirty years, I suppose, but in any event this suit against lands and its notice not only to answer to redeem the property and I hold there is no requirement that the landowner, which in this instance is a corporation, has to be advised as to the language that takes place in the summons. The summons is a question of a process and any tax foreclosure notice in a way is a process but the requirement in the summons and complaint probably goes beyond the minimum due process and probably goes beyond it submitted here that this maybe does not come up to the degree or quality of a process of summons. But it doesn't say that it doesn't meet the due process requirements. It adequately notices the defendant as to the situation. If there are taxes due on lands, they may either answer or that they may redeem. I don't find any merit in that point. There is an argument based that the notice requirements, that is, the posting of requirements factually were deficient. It is submitted they were posted in the usual place, I think, the Tax Assessor's Office, County Clerk's Office, whatever the statute calls for them. Three conspicuous places. I read the affidavits at the outset and it would be a pretty difficult thing to hear a title case and start worrying about whether, in fact, actually these notices appear or somebody went out and post notices or went out to give it the greatest exposure of people. Conspicuous is a bad meaning. I would think from the affidavit in this thing that they were posted in public buildings here and that they were in a bank building–they were about as conspicuous as would be required under the law. I can remember that in Cape May County there is a gas station that was

sort of a cracker-barrel establishment in the township and that was invariably used to post notices because of the number of natives in that township that would stop in that gas station. I don't see that that was proper. I simply mentioned it to say that the Solicitor is not bound to find three spots in the municipality with ultimate exposure to the public. It has to be conspicuous, yes, conspicuous to meet the statutory requirements. I think I've answered all the points raised in the brief and points raised in the argument. There is a technical point of standing of the defendant here to come in and there is no showing yet that she is, in fact, chain owner, but I think that is a minor point as counsel said. I think it is more technical than anything else. The Act is remedial and under the Act there is notice required. There is due process required and the case law and subject all over the federal and state law not only in this state but in other states, indicates that basically for the extreme necessity of getting public funds and no notice might be appropriate which statute calls for those and the statute must be strictly adhered to, and I think, I've indicated here that the statute was strictly adhered to in the process of this In Rem Act. In any event, the motion to set aside a final judgment will be denied.

CERTIFICATE.

I, LAURA GURTLER, a Shorthand Reporter and Notary Public in and for the State of New Jersey, do hereby certify that the foregoing is a true and accurate account of my stenographic notes taken in the above entitled transcript of proceedings transcribed to the best of my knowledge and ability.

LAURA GURTLER
Laura Gurtler

DATE: 6/13/74

APPENDIX H.

HANKIN & D'AMATO
Counsellors-at-Law
A Professional Corporation
One South New York Avenue
Atlantic City, New Jersey 08401
(609) 344-5161
Attorneys for Defendant & Appellant.

SUPREME COURT OF NEW JERSEY

A-32 September Term, 1976

DOCKET No. 12,081

CITY OF ATLANTIC CITY, in the County of Atlantic, a Municipal Corporation of the State of New Jersey,
Plaintiff-Respondent,

v.

BLOCK C-11, LOT 11,
Defendant,

and

ROSE SCHOENTHAL,
Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Notice is hereby given that Block C-11, Lot 11, Defendant, and Rose Schoenthal, Appellant, hereby appeal to the Supreme Court of the United States from the Final Judgment of the Supreme Court of New Jersey, confirming the Judgment of the Appellate Division of the Superior

Court of New Jersey, entered in this action on June 9, 1977 and from the dismissal of the Motion For Reconsideration and/or Rehearing entered in this cause on July 12, 1977.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, Sub-paragraph (2).

Dated: September 7, 1977.

HANKIN & D'AMATO
Counsellors-at-Law
A Professional Corporation

By: /s/ STEPHEN HANKIN
Stephen Hankin, Esq.

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-493

CITY OF ATLANTIC CITY, in the County of Atlantic, a Municipal Corporation of the State of New Jersey,
Plaintiff-Respondent,

v.

BLOCK C-11, LOT 11
and
ROSE SCHOENTHAL,
Appellants.

Appeal From New Jersey Supreme Court.

On Motion to Dismiss Appeal.

BRIEF OF PLAINTIFF-RESPONDENT.

WM. GODDARD LASHMAN,
City Solicitor, City of Atlantic City,
City Hall,
Atlantic City, N. J. 08401
Attorney for Plaintiff-Respondent.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

*

COUNTER-STATEMENT OF THE CASE.

Up to and including the entry of judgment in the Supreme Court of New Jersey, the proofs in this case were that the real estate in question was owned by Rose Schoenthal; that as a part of a property settlement a deed conveying it to her from Synor Co., the record owner according to the proofs submitted by the City, a corporation wholly owned by her husband, had been "purportedly" drawn and recorded.

It was not until a post-judgment "Petition to Clarify Record and/or Enlarge Record" and "Petition for Remand" was filed that Rose Schoenthal averred that as a part of a property settlement she obtained all the shares of Synor Co.

This case was tried on Appellants' position that Rose Schoenthal was owner; proof of mailing was submitted; but in light of the claim of ownership neither party pursued the mailing aspect.

In fact, of the twenty-eight (28) interrogatories submitted to the City on Appellants' post-judgment Motion for Reconsideration, one interrogatory inquired with respect to the mailing, but none inquired with respect to delivery.

If Rose Schoenthal is the owner of the stock of Synor Co., she could have changed its mailing address with the Tax Collector, as she did in or before 1972 with respect to a business property she owned (App. Div. App. Aa-24a), which was prior to the institution of this foreclosure action.

This failure on her part is remarkably similar to that in *Nelson v. New York*, 352 *U. S.* 103, 77 *S. Ct.* 195, 1 *L. ed.* 2d 171 (1956), in which misplacement by an employee of a mailed notice was held not to deprive an owner of procedural due process.

ARGUMENT.

Because the phrase "due process of law" is not defined in the Constitution, and because the varying circumstances and necessities of multitudinous situations in which it is claimed to apply must be taken into account, the requirements of due process frequently vary, depending upon the particular situation presented and the type of proceeding involved.

The circumstances and necessities here involve the exercise of the sovereign power of the State (or its delegates) to impose a tax upon land, without which tax (particularly with respect to its 567 municipalities) such municipalities could not function.

The charge is against the land; the land is the sole security for payment; and the land and not its owner or possessor, is the subject, or entity charged. And universally, the Courts have recognized that owners, or lienors, are presumed to know that taxes will be imposed upon land, and that it will be sold if they are unpaid.

The foregoing was the rationale upon which our Supreme Court, in *City of Newark v. Yeskel,* 5 *N. J.* 313, 319 to 323, finding no Federal or State judicial authority to the contrary with respect to proceedings of this nature (except for an opinion of the *Supreme Court Justices of Maine, p. 318*), affirmed the validity of this Act; with two (2) Justices dissenting because of grave doubts as to its constitutionality, and "To doubt is to deny" (p. 331).

The majority of the Justices in the case upon which review is sought hefe, after reviewing the opinions filed in applicable cases, noted the factual distinction between *Wuchter v. Pizzutti,* a negligence case, in which the statute involved made no provision for service upon the defendant, and that of the instant case, in which *Court Rule 4:64-7(c),* although directory, was followed.

The concurring Justices in the instant case deemed "the statute entirely unexceptionable" in that it was followed "in respect of *publication* and *posting* of notice"; and the same Justices, in the *Township of Montville* case (App. E) adhered to the same opinion.

It is submitted that a holding that identical requirements for notice apply in negligence cases and in cases involving the collection of real estate taxes creates a rigidity in the due process clause which this Court has never countenanced.

The Majority of the Justices of our Supreme Court in the *Montville* case (App. E) held that, notwithstanding its existing rule, notice must be mailed to the "owner" in all foreclosure proceedings presently pending or thereafter filed; with the same Justices who concurred in the instant case dissenting.

Because of the exhaustive review of the decisions of this Court in the opinions of the New Jersey Supreme Court (those of the majority, concurring and dissenting Justices) in the cases of *City of Newark v. Yeskel,* 5 *N. J.* 313 (1950); *Township of Montville v. Block 69, Lot 10,* 74 *N. J.* 1 (1977); and that of the instant case, 74 *N. J.* 34 (1977), the rationale for determining the requirements of the due process clause and its flexibility depending upon the nature of the proceeding; the City does not feel that it can add anything of value to what has been said.

However, because of a similarity of facts (except for the fact that the New York statute required no notice other than by publication and the New Jersey Rule of Court permits, but does not require, mailing of a notice). *Botens v. Aronauer,* 414 *U. S.* 1059, — *S. Ct.* —, 38 *L. Ed. 2d* 464, which was dismissed for want of a federal question, most closely resembles the situation here.

Because:

(a) A copy of the notice of foreclosure was timely mailed to Synor Co. at its last known address as it appears on the last municipal tax duplicate; and

(b) Synor Co. is now admitted to be the actual owner; and

(c) Non-receipt of the mailed notice resulted from the failure to furnish a change of mailing address to the Tax Collector by Rose Schoenthal, if she is the owner of the stock in said Company, at the time she furnished such change with respect to other real estate owned by her in the City; and

(d) The notice provisions in the In Rem Tax Foreclosure Act and the Rule of Court do not contravene the due process clause of the Fourteenth Amendment;

the within appeal should be dismissed on the ground that it does not present a substantial federal question.

Respectfully submitted,

WM. GODDARD LASHMAN,
City Solicitor, City of Atlantic City,
City Hall,
Atlantic City, N. J. 08401
Attorney for Plaintiff-Respondent.